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House of Representatives

The House was not in session today. Its next meeting will be held on Tuesday, September 14, 2010, at 2 p.m.

Senate

TUESDAY, AUGUST 3, 2010

The Senate met at 9:30 a.m. and was called to order by the Honorable CARTE P. GOODWIN, a Senator from the State of West Virginia.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Eternal Lord God, who comforts us in all our troubles, be near to our lawmakers today. When they feel tired or unappreciated, remind them that You keep a record of their labors and will reward them for their faithfulness. May the realization that You are close beside them keep them from becoming weary in their efforts to keep America strong. As they remember that pleasing You should be their first priority, fill them with a peace the world can't give or take away. Lord, lead them into a future of faith, love, and peace. We pray in Your sacred Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable CARTE P. GOODWIN led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. INOUYE).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, August 3, 2010.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable CARTE P. GOODWIN, a Senator from the State of West Virginia, to perform the duties of the Chair.

DANIEL K. INOUYE,
President pro tempore.

Mr. GOODWIN thereupon assumed the chair as Acting President pro tempore.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, leadership time is reserved.

EXECUTIVE SESSION

NOMINATION OF ELENA KAGAN TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The assistant legislative clerk read the nomination of Elena Kagan, of Massachusetts, to be Associate Justice of the Supreme Court.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

Mr. REID. Mr. President, while we continue working this week to create jobs and finish the unfinished business of this work period, we will also turn to the nomination of Supreme Court nominee Elena Kagan.

Giving the President the Senate's advice and consent, as prescribed by the Constitution for a lifetime appointment to the highest Court in the country, is one of this body's most solemn obligations.

Chairman LEAHY and Ranking Member SESSIONS oversaw, through the lengthy process, very thorough and respectful confirmation hearings. All of them were fair and I think were probative. I thank them both for their leadership.

Several Senators have already made known how they will vote on Ms. Kagan's nomination. Those Senators and many others will come to the floor in the next few days to explain their positions. I will be one of them speaking in support of this exceptional nominee. I will certainly give her my vote.

As the debate moves to the Senate floor and as we move toward a final vote, I look forward to a continuation of the passionate but civil discussion we have seen in the committee thus far. In this respect, perhaps we can draw inspiration from Ms. Kagan herself. In her confirmation hearing last year for the position she currently holds—as our Nation's Solicitor General, that is our Government's lawyer in cases that come before the U.S. Supreme Court—Ms. Kagan testified that one of the attributes she would bring to the job was an ''understanding of how to separate the truly important from spurious.''

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

In the final days of this process, I suggest we keep those words in mind. I hope my fellow Senators will bring to this debate the same appreciation for what is critical to the Court and to our country, that will keep it separate from what is not.

The ACTING PRESIDENT pro tempore. The Senator from Vermont is recognized.

MEASURE PLACED ON CALENDAR—H.R. 5901

Mr. LEAHY. Mr. President, I understand that H.R. 5901 is at the desk and due for a second reading.

The ACTING PRESIDENT pro tempore. Without objection, the clerk will read the title of the bill for the second time.

The assistant legislative clerk read as follows:

A bill (H.R. 5901) to amend the Internal Revenue Code of 1986 to exempt certain stock of real estate investment trusts from the tax on foreign investment in United States real property interests, and for other purposes.

Mr. LEAHY. I object to any further proceedings on this measure at this time.

The ACTING PRESIDENT pro tempore. Objection is heard. The bill will be placed on the calendar.

Mr. LEAHY. Mr. President, what is the order?

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Vermont, Senator LEAHY, will control the first 30 minutes, and the Senator from Alabama, Senator SESSIONS, will control the second 30 minutes.

The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, more than 12 weeks ago, President Obama nominated Elena Kagan to succeed Justice John Paul Stevens as an Associate Justice of the Supreme Court of the United States. When the President announced his choice on May 10, he talked about her legal mind, her intellect, her record of achievement, her temperament and her fair-mindedness.

Having heard from Solicitor General Kagan at her confirmation hearing 5 weeks ago, I believe the American people have a sense of her impressive knowledge of the law, her good humor, and her judicial philosophy. In her testimony, she made clear that she will base her approach to deciding cases on the law and the Constitution, not on politics, not on an ideological agenda. She indicated that she will not be the kind of Justice who will substitute her personal preferences, and overrule the efforts of Congress to protect hard-working Americans pursuant to our constitutional role. Solicitor General Kagan made one pledge to those of us who were at that hearing: that she will do her ''best to consider every case impartially, modestly, with commitment to principle, and in accordance with law.''

Incidentally, I might say, at the outset, I compliment Republicans and Democrats alike for the amount of time Senators spent at the hearing. I certainly compliment the ranking member, Senator SESSIONS. We may have disagreed on the outcome and on the vote, but I think Senators worked very hard to get questions asked, to make sure that the American people knew who Elena Kagan was. I note that Senator SESSIONS and I set the times for witnesses and all. We were constrained somewhat by the distinguished Presiding Officer's predecessor, who died that week, and we were trying to arrange time for many of us to go to the funeral. I wanted to publicly thank Senator SESSIONS for his help in working out that schedule.

No one can question the intelligence or achievements of this woman. No one should question her character either. Elena Kagan was the first woman to be the Dean of the prestigious Harvard Law School and the first woman in our Nation's history to serve as Solicitor General, a position often referred to as the ''Tenth Justice.'' As a student, she excelled at Princeton, Oxford and Harvard Law School. She worked in private practice and briefly for then-Senator JOE BIDEN on the Judiciary Committee. She taught law at two of the Nation's most respected law schools, and counseled President Clinton on a wide variety of issues. She clerked for two leading judicial figures, Judge Abner Mikva on the Court of Appeals for the District of Columbia Circuit, and then for Supreme Court Justice Thurgood Marshall, on one of the most extraordinary lawyers in American history.

I have been here since the time of President Gerald Ford, and I have long urged Presidents from both political parties to look outside what they call the ''judicial monastery,'' and not feel restricted to considering only Federal appellate judges to fill vacancies on the Supreme Court. This, of course, is what Presidents used to do. With his second nomination to the Court, President Obama has done just this; he has gone outside the judicial monastery. When confirmed, Elena Kagan will be the first non-sitting judge to be confirmed to the Supreme Court in almost 40 years, since the appointments of Lewis Powell and William Rehnquist.

I know there was criticism by some Republicans that this nominee lacks judicial experience. Of course, that ignores one key fact. President Clinton nominated her to the DC Circuit Court in 1999. The Senate was controlled by Republicans at the time and it was Senate Republicans who refused to consider her nomination. She was pocket filibustered. Had the Republicans not done so, Elena Kagan would have been confirmed and would have had more than 10 years judicial experience. To give you some idea of her abilities, instead, when she was not allowed to have a vote for the DC Circuit Court, she went on to become an outstanding law professor, the first woman Dean of Harvard Law School—one of the most prestigious law schools in the country, actually the world—and the first woman to serve as the Solicitor General of the United States. Her nomination to the Supreme Court received the highest possible rating from the American Bar Association's Standing Committee on the Federal Judiciary. Her credentials and legal abilities have been extolled by many across the political spectrum. Two of these individuals were Justice Sandra Day O'Connor and Justice Antonin Scalia. In addition, Michael McConnell, Kenneth Starr and Miguel Estrada have given praise to this nomination. Like Justices Hugo Black, Robert Jackson, Earl Warren, William Rehnquist and so many others, Solicitor General Kagan's experience outside the judicial monastery will be valuable to her when she is confirmed. No one can question the intelligence or achievements of this woman. I hope nobody would question her character either.

From the moment her nomination was announced, Solicitor General Kagan has spoken about the importance of upholding the rule of law and enabling all Americans to have a fair hearing. She said that ''law matters; because it keeps us safe, because it protects our most fundamental . . . freedoms; and because it is the foundation of our democracy.'' Like her, I believe the law does matter in people's lives. That is why I went to law school. That is why I practiced law and then became a prosecutor. That is why I ran for the Senate. I believe that the law matters in people's lives, because the Constitution is this amazing fabric of our Nation; it is our protection. She understands this, as did her mentor, Justice Thurgood Marshall.

In her contribution to the 1993 tribute to Justice Marshall by the Texas Law Review, Elena Kagan recalled how Justice Marshall's law clerks had tried to get him to rely on general notions of fairness, rather than a strict reading of the law, so they could allow an appeal to proceed on a discrimination claim. She wrote that the then 80-year-old Justice referred to his years trying civil rights cases and said: All you could hope for was that a court would not rule against you for illegitimate reasons. You could not expect that a court would bend the rules in your favor. That is the rule of law. Just as Sir Thomas More reminded his son-in-law in that famous passage from ''A Man for All Seasons,'' that the law is our protection, Justice Marshal reminded his law clerks that the existence of rules and the rule of law is the best protection for all, including the least powerful. Elena Kagan concluded, as I do, that Justice Marshall ''believed devoutly . . . in the rule of law.'' He was a man of the law in the highest sense. He understood the Constitution's promise of equality.

I was disappointed to see the manner in which his legacy was treated by some during the recent confirmation hearing, and to read that there are Republican Senators, currently serving, who recently said they would vote

against Thurgood Marshall's confirmation to the Supreme Court if he were up now. He was a giant, and I would hope that if he were here again, those Senators would reconsider whether they would vote for him.

With this nomination, Elena Kagan follows in the footsteps of Justice Marshall, who was also nominated to the Supreme Court from the position of Solicitor General. She broke a glass ceiling when she was appointed as the first woman to serve as Solicitor General of the United States and when she served as the first woman dean of the Harvard Law School. When the Supreme Court next convenes, for the first time in our history, I predict there will be three women serving together among the nine Justices.

The stakes at the Nation's highest court could not be higher. One need look no further than the Lilly Ledbetter case to understand the impact that each Supreme Court appointment has on the lives and freedoms of countless Americans. In the Ledbetter case, five Justices of the Supreme Court struck a severe blow to the rights of working families across our country. Congress acted to protect women and others against discrimination in the workplace more than 40 years ago, but we still struggle to ensure that all Americans—women and men—receive equal pay for equal work. It took a new Congress, joined by our new President, to reverse the activist conservative majority in the Supreme Court by passing the Lilly Ledbetter Act, striking down the immunity the Supreme Court had given to employers who discriminate against their employees and successfully hid their wrongdoing. The Ledbetter case said, in a decision I still find shocking, that they could pay men a higher rate than women for the same work. As long as they kept it hidden, it was OK.

Recently in the Citizens United case, just one vote on the Supreme Court determined that corporate money can drown out the voice of Americans in elections that decide the direction of our democracy. They said that if British Petroleum wanted to spend hundreds of millions of dollars to defeat people who want to tighten the controls on our offshore drilling, or want to tighten the kind of inspections required for offshore drilling, British Petroleum, according to the Supreme Court, could spend hundreds of millions of dollars to defeat these people.

I had hoped that Senate Republicans would join our effort to respond to the conservative activist majority of the Supreme Court, who wrongly decided to override its own precedent and 100 years of legal development in Citizens United. Unfortunately, last week they filibustered the DISCLOSE Act and gave their endorsement to unfettered corporate influence in American elections.

For all the talk about ''judicial modesty'' and ''judicial restraint,'' from the nominees of a Republican President at their confirmation hearings, we have seen a Supreme Court in the last 5 years that has been anything but modest and restrained. What we have seen all too often in these last years is the activist conservative members of the Supreme Court substituting their own judgment for that of the American people's elected representatives.

I have always championed judicial independence. I think it is important that judicial nominees understand that, as judges, they are not members of an administration—any administration, Democratic or Republican, but they are judicial officers. They should not be political partisans, but judges who uphold the Constitution and the rule of law for all Americans. That is what Justice Stevens did in Hamdan, which held the Bush administration's military tribunals unconstitutional, and what he tried to do in Citizens United. That is why intervention by an activist conservative majority in the 2000 Presidential election in Bush v. Gore was so jarring and wrong. Mr. Gore had gotten the majority of votes throughout the country, but there was just one vote on the Supreme Court that he didn't get—the one vote that decided the election. That one vote was given to President Bush.

During her confirmation hearings, Solicitor General Kagan reflected an understanding of the judicial role and the traditional view of deference to Congress and judicial precedent. This is the mainstream view and one once embraced by conservatives. She indicated she would not be the kind of Justice who would substitute her personal preferences and overrule congressional efforts designed to protect hard-working Americans pursuant to our constitutional role. In fact, it is precisely because of Solicitor General Kagan's independence that many Republicans have announced their opposition to her nomination. They oppose her not because she would be a judicial activist as they claim, but rather because she would not overrule Congress as much as they would like. They seem not to like the fact that she is genuinely committed to judicial restraint rather than furthering a conservative ideological agenda.

Some who oppose this nomination do so because they seek to make this nomination a continuation of the fight over health care. They seek to transform this policy dispute they lost in Congress into a constitutional one that goes against 100 years of law and Supreme Court precedents. They would turn back the clock by resurrecting long-discredited legal doctrines wisely rejected nearly a century ago. They oppose Solicitor General Kagan because she will not commit to a narrow and outmoded legal view that would undermine the constitutionality of health insurance reform.

Congress has enacted and the President has signed into law the landmark Patient Protection and Affordable Care Act. I believe Congress was right to do so in order to address our health care crisis and ensure that Americans who work hard their entire lives are not robbed of their family's security because health care is too expensive. We were right to make sure that hard-working Americans do not risk bankruptcy with every illness. Many Republican Senators disagreed, as is their right, and voted against the law. But many of those who opposed this law now seek to do in the courts what they could not do by obstruction in Congress. They are so adamant in seeking this result, that they would turn back the clock by resurrecting long-discredited legal doctrines wisely rejected a nearly a century ago.

In framing their opposition to health insurance reform as a constitutional attack, these critics would also undermine the constitutional basis of laws against child labor and those setting a minimum wage or the Social Security Act, Medicare, the Clean Water Act, the Clean Air Act, and the landmark Civil Rights Acts. All are constitutional because of Congress's authority to legislate pursuant to the core powers vested in Congress by article I, section 8 of the Constitution, including the general welfare clause, the commerce clause, and the necessary and proper clause. The radical consequences of a narrow-minded agenda would be to erode the Supreme Court's time-honored interpretation of these enumerated powers that give Congress the ability to promote the general welfare of the American people.

These critics wish to return to the conservative judicial activism of the early 1900s, a period known by reference to one of its most notorious cases, the 1905 Lochner decision in which the Supreme Court struck down a New York State law protecting the health of bakers by regulating the number of hours they could work.

During this period of unbridled conservative judicial activism, the Supreme Court substituted their own views of property for those of the elected branches in order to strike down nearly 200 laws, including laws outlawing child labor—something we take for granted today—and laws protecting Americans from sick chickens—something that created a huge health hazard. They envisioned their principal role as the defender of business's profits—profits they made with child labor—and the protector of unrestrained ability to perform contracts, however onerous or one-sided. The American people suffered. Their rights went unprotected. Congress was unable to provide assistance. That is not a time anyone should want to return to because it was based on artificial legal restraints that shackled the people's elected representatives in Congress.

Millions of Americans rely on Social Security, Medicare, unemployment benefits, minimum wage laws, and other programs to protect Americans in tough economic times. This radical conservative agenda is a threat to Federal disaster relief and environmental

regulations and even laws responding to the reckless and fraudulent behavior that wrecked our economy.

Progressive opponents of these artificial legal restraints ultimately succeeded, with the support of the American people, in establishing Social Security, minimum wage laws, and antidiscrimination laws to protect the American people. The programs of the New Deal that helped Americans through the Great Depression would be unconstitutional if radical conservative critics had their way. Radical conservatives who seek to again impose artificial legal restraints on Congress and the American people would abandon the New Deal programs of the 1930s such as social security and the Great Society programs of the 1960s such as Medicare to the detriment of the American people. These are the programs that for the last 75 years have helped the United States become a world leader, with the economic security of our citizens leading our economy to grow to lead the world.

Millions of Americans rely on Social Security, Medicare, unemployment benefits, minimum wage laws and other programs that protect American families in tough economic times such as these. This is no academic discussion. This radical conservative agenda is a threat to Federal disaster relief, environmental regulations, and even laws responding to the reckless and fraudulent behavior that wrecked the economy. America's great safety net for those in need would be left in tatters if this outmoded legal doctrine were to take root.

Ask our fellow Americans in the gulf, those who have lost their jobs in the recession and those who have lost their homes, whether the Court should adopt this radical view of the limits of Congress's power to help them. Ask them if they want to roll back the clock and overturn laws passed by Congress to protect hard-working Americans. The conservative agenda to restore the Lochner era would leave hard-working Americans without the protection their lifetimes of hard work have earned them.

The fact that Elena Kagan will not state that she shares the views of those who opposed helping hard-working Americans obtain access to affordable health care does not mean she is outside the mainstream—far from it. The fact that some Republican critics opposed health care reform does not make it unconstitutional.

The Constitution in fact provides a clear basis for Congress' authority to enact health care insurance reform. Our Constitution begins with a preamble that sets forth the purposes for which ''We the People of the United States'' ordained and established it. Among the purposes set forth by the Founders was that the Constitution was established to ''promote the general Welfare.'' It is hard to imagine an issue more fundamental to the general welfare of all Americans than their health. The authority and responsibility for taking actions to further this purpose is vested in Congress by article I of the Constitution. As I stated earlier, article I, section 8, sets forth several of the core powers of Congress, including the general welfare clause, the commerce clause and the necessary and proper clause. These clauses form the basis for Congress's power.

Any serious questions about congressional power to take comprehensive action to build and secure the social safety net have been settled over the past century. As noted by Tom Schaller, enforcing the individual mandate requirement by a tax penalty is far from unprecedented, despite the claims of critics. Individuals pay for Social Security and Medicare, for example, by payroll taxes collected under the Federal Insurance Contributions Act, FICA. These FICA payments are typically collected as deductions and noted on Americans' paychecks every month. Professor Schaller wrote:

> These are the two biggest government-sponsored insurance programs administered by the [Federal Government], and two of the largest line items in the federal budget. These paycheck deductions are not optional, and for all but the self-employed they are taken out immediately.

The individual mandate requirement in the Patient Protection and Affordable Care Act is hardly revolutionary when viewed against the background of Social Security and Medicare that have long required individual payments.

Congress has woven America's social safety net over the last threescore and 13 years, beginning before I was born. Congress's authority to use its judgment to promote the general welfare cannot now be in doubt. America and all Americans are the better for it. Growing old no longer means growing poor. Being older or poor no longer means being without medical care. These developments are all due in part to congressional action.

The Supreme Court settled the debate on the constitutionality of Social Security more than 70 years ago in three 1937 decisions. In one of those decisions, Helvering v. Davis, Justice Cardozo wrote that the discretion to determine whether a matter impacts the general welfare falls ''within the wide range of discretion permitted to the Congress.'' Turning then to the ''nation-wide calamity that began in 1929'' of unemployment spreading from state to state throughout the Nation, Justice Cardozo wrote of the Social Security Act: ''The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.'' In the Supreme Court's decision upholding the constitutionality of Social Security, Justice Benjamin Cardozo, one of our greatest jurists, explained that it is the people's elected representatives in Congress that consider the general welfare of the country and laws to secure it. He recognized that it was the people's wisdom as enacted through their representatives that was to be respected, not the personal preference of a small elite group of judges.

The Supreme Court reached its decisions upholding Social Security after the first Justice Roberts—Justice Owen Roberts—in the exercise of good judgment and judicial restraint began voting to uphold key New Deal legislation. He was not alone. It was Chief Justice Hughes who wrote the Supreme Court's opinion in West Coast Hotel v. Parrish upholding minimum wage requirements as reasonable regulation. The Supreme Court also upheld a Federal farm bankruptcy law, railroad labor legislation, and the Wagner Act on labor relations. In so doing, the Supreme Court abandoned its judicially created veto over congressional action with which it disagreed on policy grounds and rightfully deferred to Congress's constitutional authority.

The opponents of health care insurance reform are now opposing the nomination of Elena Kagan and now going to the extreme to attempt to call into question the constitutionality of America's established social safety net. They would turn back the clock to the hardships of the Great Depression, and thrust modern America back into the conditions of a Charles Dickens novel. That path should be rejected again now, just as it was when Americans confronted great economic challenges more than 70 years ago. To attempt to strike down principles that have been settled for nearly three-quarters of a century is wrong, damaging to the Nation, and would stand the Constitution on its head.

Due to Republican obstruction, it took an extraordinary majority of 60 Senators, not a simple majority of 51, for the Senate's will to be done. The fact that Senate Republicans disagree with the effort to help hardworking Americans obtain access to affordable health care does not make it unconstitutional. As Justice Cardozo wrote for the Supreme Court 73 years ago in upholding Social Security:

> [W]hether wisdom or unwisdom resides in the scheme of benefits set forth . . . it is not for us to say. The answer to such inquiries must come from Congress, not the courts.

Justice Cardozo understood the separation of powers enshrined in the Constitution and the powers entrusted by our Constitution to Congress. This is true judicial modesty reflecting the understanding of the respective roles of Congress and the courts. Surely when Congress acts to provide for the general welfare of all Americans it does so pursuant to its constitutional authority.

I believe that Congress was right when it decided that the lack of affordable health care and health insurance and the rising health care costs that

burden the American people are problems, ''plainly national in area and dimensions.'' Those were the words Justice Cardozo used to describe the widespread crisis of unemployment and insecurity during the Great Depression. I believe that it was right for Congress to determine that it is in the general welfare of the Nation to ensure that all Americans have access to affordable quality health care. Whether other Senators agree or disagree, I would hope that none would contend that we should turn back the clock to the Great Depression when conservative activist judges prevented Congress from exercising its powers, making its legislative determinations and helping the American people through tough economic times. Sadly, some are making precisely that argument and contend that this settled meaning of the Constitution should be upended.

The dark days of unbridled conservative judicial activism in which Congress's hands were tied from outlawing child labor and enacting a minimum wage and social security are long gone and better left behind. The Constitution, Supreme Court precedent, our history and the interests of the American people all stand on the side of Congress's authority to enact health care insurance reform legislation.

Under article I, section 8, Congress has the power ''to regulate Commerce . . . among the several States.'' Since at least the time of the Great Depression and the New Deal, Congress has been understood and acknowledged by the Supreme Court to have power pursuant to the commerce clause to regulate matters with a substantial effect on interstate commerce. That is consistent with Elena Kagan's testimony.

In Solicitor General Kagan's responses to questions about the commerce clause I heard an echo of Justice Cardozo's explanation for why Social Security is constitutional and of Justice Oliver Wendell Holmes's famous dissent in Lochner. In particular, I recall Solicitor General Kagan's response to a question from Senator COBURN that he later admitted was intended to get her to signal how she would decide a constitutional challenge to health care insurance reform. He asked Solicitor General Kagan what she thought of a hypothetical law requiring Americans to eat three vegetables a day. She went on to explain:

I think the question of whether it's a dumb law is different from . . . the question of whether it's constitutional, and . . . I think that courts would be wrong to strike down laws that they think . . . are senseless just because they're senseless.

The Supreme Court long ago upheld laws like the Fair Labor Standards Act against legal challenges, overruling its decision barring Congress from outlawing child labor and establishing basic working conditions such as a minimum wage. The days when women and children could not be protected are gone. The time when the public could not be protected from sick chickens infecting them are gone. The years when farmers could not be protected from market failures or natural disasters are gone. The era of conservative activist judges voiding regulation that did not guarantee profits to corporations should be gone. The reach of Congress's commerce clause authority has been long established and well-settled. Solicitor General Kagan's answer to Senator COBURN's question reflects not only this well-settled understanding, but also the understanding of the proper roles of each of the branches that was restored when the Supreme Court rejected the misguided conservative activism of the Lochner era.

Since the great Chief Justice Marshall's interpretation of the commerce clause in 1824, Congress has been understood and acknowledged by the Supreme Court to have the power ''to prescribe rules'' to govern commerce that ''concerns more than one State.'' It was this same understanding that Justice Cardozo followed in upholding the Social Security Act and that Justice Felix Frankfurter later praised as Chief Justice Marshall's extraordinary achievement of capturing, for all time, the essential meaning of the commerce clause. Pursuant to this understanding of its power under the commerce clause, Congress enacted not only Federal disaster relief from the 18th century but also the 1964 Civil Rights Act prohibiting racial discrimination by public accommodations and the landmark Clean Air and Clean Water Acts, both of which President Nixon signed into law. Would conservative activists now argue that these acts, the Civil Rights Act, the Clean Air Act and the Clean Water Act, should suddenly be declared unconstitutional as beyond Congress's power?

Even recent decisions by a Supreme Court dominated by Republican-appointed justices have affirmed this rule of law. In 2005, the Supreme Court ruled in Gonzales v. Raich that Congress had the power under the commerce clause to prohibit the use of medical marijuana. This was upheld even though the marijuana was grown and consumed at home. It was upheld on the same rationale as Wickard v. Filburn in 1942, because of its impact on the national market for marijuana. Yet Republican Senators and conservative ideologues contend that Wickard should be discarded. Would they also demand that Federal laws against drugs be declared unconstitutional?

Justice Anthony Kennedy and Justice Sandra O'Connor, both conservative Justices appointed by Republican Presidents, astutely noted in their 1995 concurrence in United States v. Lopez:

[T]the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. [That] fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy . . . and mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system.

They are right as a matter of law and right when it comes to the interests of the American people.

The Constitution also provides in article I, section 8, that Congress has the power ''to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by his Constitution in the United States.'' The Supreme Court settled the meaning of the necessary and proper clause almost 200 years ago in Justice Marshall's landmark decision for the Supreme Court in McCullough v. Maryland, during the dispute over the National Bank. Justice Marshall wrote that ''the clause is placed among the powers of Congress, not among the limitations on those powers.''

He continued:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

He concluded by declaring, in accordance with a proper understanding of the necessary and proper clause, that Congress should not be deprived ''of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to human affairs'' by judicial fiat. Chief Justice Marshall understood the Constitution, knew its text and knew the Framers. He rejected the constraints on Congress that conservative activists now propose in order to empower conservative judicial activism.

The necessary and proper clause goes hand in hand with the commerce clause to ensure congressional authority to regulate activity with economic impact. Just this year the Supreme Court upheld provisions of the Adam Walsh Child Protection and Safety Act, a law we passed to allow for the civil commitment of sexually dangerous Federal prisoners, which was based on the commerce clause and the necessary and proper clause of the Constitution. As Justice Breyer wrote for seven Justices, including Chief Justice Roberts:

[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are ''convenient, or useful'' or ''conducive'' to the authority's ''beneficial exercise.''

Congress passes laws like the Adam Walsh Act every year to protect the American people. Would those who want to redraft and limit the Constitution really want to declare the Adam Walsh Act and its provisions against pedophiles unconstitutional?

Solicitor General Kagan's testimony shows that she both understands and recognizes, in accordance with the longstanding judgments of both Congress and the Supreme Court, that Congress's power to legislate under the commerce clause power and the necessary and proper clause is broad but

not unlimited. Indeed, she agreed with the Senator from Texas that the Supreme Court's decisions in Lopez and Morrison limit Congress's power to legislate ''when the activity that's being regulated is not itself economic in nature and is activity that's traditionally been regulated by the States.'' But, she noted that ''to the extent that Congress regulates the channels of commerce, the instrumentalities of commerce, and . . . things that substantially affect interstate commerce, there the Court has given Congress broad discretion.'' She is right as a matter of law. The American people are able to act through their elected representatives in Congress to secure the blessings of liberty because of this meaning of our Constitution.

Through Social Security, Medicare, and Medicaid, Congress established some of the cornerstones of American economic security. And comprehensive health insurance reform has now joined them. Congress has acted within its constitutional authority to legislate for the general welfare of all Americans, whether they are from Vermont or West Virginia or Alabama or anywhere else. No conservative activist court should overstep the judiciary's role by seeking to turn back the clock and deny a century of progress.

Those who would corrupt the Constitution by trying to revive the Lochner era are intent on a results-oriented litmus test. This litmus test would lead them now not just to vote against this nomination and the confirmation of Justice Thurgood Marshall as they have said, but also against Senate confirmation of Justice Sandra Day O'Connor, Justice David Souter, Justice John Paul Stevens, and Justice Anthony Kennedy—four Justices appointed by conservative Republican Presidents, all nominations I voted to confirm.

It is interesting. I was here when John Paul Stevens' nomination came up. He was seen as a conservative from Illinois. He was nominated by a conservative President, Gerald Ford. He nominated him, and 2½ weeks later, the Senate, which was overwhelmingly Democratic, voted unanimously to confirm Justice John Paul Stevens. I have not always agreed with every decision of his, but, boy, I have agreed with my vote for his confirmation.

With this litmus test I mentioned, it is not just Chief Justice Earl Warren, and Justice William Brennan and Justice Thurgood Marshall whose jurisprudence they are rejecting. Using these results-oriented litmus tests would require us to reject the vast majority of Justices who have served honorably on the U.S. Supreme Court, including Justice Benjamin Cardozo, Justice Oliver Wendell Holmes, Jr., Justice Harlan Fiske Stone, and Justice Charles Evans Hughes. I assume they would, as well, reject the greatest judge not to have been appointed to the Supreme Court, the Second Circuit's Judge Learned Hand, because he had been an outspoken critic of the so-called economic due process doctrine that allowed activist conservatives to substitute their views for those of Congress. Indeed, if they were to be consistent, they would have to rethink their support for the current Chief Justice, John Roberts, who testified at his confirmation hearing that during the Lochner era, when the Supreme Court was striking down economic regulations in the late 1800s to the early 1930s, to quote John Roberts, ''it's quite clear that they [were] not interpreting the law, they [were] making the law.'' I agree with him. I will say parenthetically that I wish he had stayed consistent to that principle since he became Chief Justice. The demand by critics that Solicitor General Kagan adhere to legal views that would put her at odds with so many great Justices as the price of their vote is a strong reminder of how far many are seeking to stray from basic constitutional principles and traditions.

We do not need judges or Justices to pass a litmus test from either the right or the left. In fact, I have urged Senators—they have heard me say this many times—do not listen to the single issue or special issue groups on either the right or the left when it comes to the Supreme Court. We have 300 million Americans in this great country. Most of the Justices we vote on will be here long after any one of us leaves this Chamber. There are only 100 Americans who actually get to vote on them. There are actually 101 people who are involved in this choice—first, the President, who nominates the person, but he cannot appoint the person unless we advise and consent. So we have 101 people with this awesome duty to pick somebody and to vote on somebody who is going to be there to protect the justice and the rights of all 300 million Americans. It is an awesome responsibility.

I tell groups of either the right or the left—and I have heard from many of them over the years on all these nominees on whom I voted—I am going to make up my own mind. I am going to bring my own Vermont principles, my own sense of Vermont fairness, my own experience, my own judgment to bear, and then I will make up my mind. I urge all Senators to do that. Ignore the special interest groups on the right or the left. Make up your own mind.

As I said, we do not need judges or Justices who would pass a litmus test from the right or the left. We need judges and Justices who will respect the laws as passed by Congress and appreciate that adherence to precedence is a foundation of public confidence in our courts.

(Mrs. SHAHEEN assumed the chair.)

Mr. LEAHY. It is important that we restore public confidence in our courts. They do protect our rights. They do protect the Constitution. But we have to make sure we respect what they do. We need judges and Justices who will fairly apply the law and use common sense, Justices and judges who appreciate the proper role of the courts in our democracy and make decisions in light of the fundamental purposes of the law. This is the standard I applied when reviewing this nomination. It is the same standard I applied to every Supreme Court nomination, including six Justices nominated by Republican Presidents for whom I have voted. It is a standard I believe Solicitor General Kagan has met.

Solicitor General Kagan not only has the necessary qualifications to be a Supreme Court Justice but has also demonstrated her respect for the rule of law, her appreciation for the separation of powers, and understands the meaning of our Constitution. Some may not want our country to move forward, to make progress, to move toward a more perfect union. But the issue squarely before this body is whether Solicitor General Kagan has the necessary qualifications, respect for the rule of law, and judicial independence to be confirmed by the Senate to serve on our Nation's highest court. I believe she does. This Vermonter will vote for Elena Kagan to be a Supreme Court Justice, and I will do it proudly.

Madam President—the Chair having changed during this speech, first presided over by the distinguished Senator from West Virginia, and now my distinguished neighbor, the State of New Hampshire—the distinguished Senator from New Hampshire presides. With that, I will close.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEAHY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Madam President, I see the distinguished Senator from Alabama on the floor. I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Madam President, I appreciate Chairman LEAHY. He is a strong and effective leader of our committee. We agree a lot of times. I try to work with him, and sometimes we disagree. One thing we will soon be doing that I look forward to very much is going to the White House—maybe in 30 minutes or so—to participate in the signing of a bill to eliminate the vast disparity between crack and powder cocaine sentences. The sentencing mechanism under the guidelines I think was unfair and needed to be corrected. I have been working on that issue for some time, and so has Chairman LEAHY. We certainly agree on a lot of issues and get some things done, but we do not agree on this nomination.

The office of Justice of the U.S. Supreme Court is one of the most important positions in our National Government. Justices are granted a degree of

independence unequaled anywhere in the United States. Justices hold lifetime terms, subject only to impeachment, and Congress may not even reduce their pay. Why did the Founders take such a step? They wanted our courts to be impartial, doing justice to the poor and the rich under the Constitution and laws of the United States, as their oath says, and they did not want them subject to political or other pressures that might affect their objectivity. They wanted judges who could do the right thing year after year, day after day.

Presidents get to nominate, but the Senate must confirm. This advise-and-consent power the Constitution gives is a confirmation process; it is not a coronation. Here, five Justices on the Supreme Court can hold—and four of them recently voted to, not the five necessary to render a majority opinion—that a company cannot publish a book or a pamphlet that criticizes a politician before an election. Five justices can hold that the government can allow States and cities to deny Americans the personal right to keep and bear arms, a right clearly stated in the Constitution.

The American people have no direct control over these Justices. All they have and what they have a right to expect is that our Justices exercise self-control year after year, decade after decade. If this young nominee, Elena Kagan, were to serve to the age of the individual she seeks to replace, she would serve 38 years on the Supreme Court.

Well, I am not able to support Elena Kagan for this office. I believe she does not have the gifts and the qualities of mind or temperament one must have to be a Justice. Worse still, she possesses a judicial philosophy that does not properly value discipline, restraint, and rigorous intellectual honesty. Instead, she seems to admire the view, and has as her judicial heroes, judges who favor expansive readings of what they call the living Constitution; whereby, judges seek—and in President Obama's words, who certainly shares this view—to advance ''a broader vision of what America should be.''

Well, I don't believe that is a responsibility or a power given to judges—to advance visions of what America should be. Whose vision is it they would advance, I would ask. It would be the judge's vision. But they weren't appointed for that purpose. They were appointed to adjudicate cases.

President Obama's judicial philosophy, I think, is flawed, and I certainly think Ms. Kagan shares his philosophy. The President basically said so when he appointed her. Her friends say it is so. Her critics say so. Her record of public action says so, and the style and manner of her testimony at the hearing evidenced such an approach to judging. I don't think it is a secret. I think this is pretty well known, that this is not a nominee committed to restraint or objectivity but one who believes in the power of judges to expand and advance the law and visions of what the judge may think is best for America.

Ms. Kagan has been described as collegial, engaging, a consensus builder. These are fine qualities in many circumstances, and I am sure she possesses them. She seems to. But as to personal discipline, clarity of mind, the ability to come quickly to the heart of a matter, objectivity or impartiality, and scrupulous intellectual honesty—characteristics essential for a judge—not so much has been said. Perhaps this is so because many liberal activists in America have lost faith in the idea of objectivity, which means they have lost faith in the reality of objective truth, the finding of which—the finding of truth—has been the goal, the central focus of the American legal system since its creation.

Our modern law school minds and some false intellectuals far removed from real trials—and I have had the honor and privilege to have spent 15 years trying cases before Federal judges and so I have a sense of this, I truly believe—are removed from these trials and from the necessity of rules for civil order. They think, many of them do—these professors and theoreticians—that laws are just tools for the powerful to control the powerless and that words can't have fixed meanings. Things change. We can't consult 16th century dictionaries to find out what the Founding Fathers meant when they wrote our Constitution. Indeed, Justice Sotomayor recently confirmed this when she quoted, with approval, the line: ''There is no objectivity, just a series of perspectives.''

Americans are sick of political spin by politicians, and they do not want it from judges. They reject judges who rely on their empathy, as the President said a judge must have and that is what he looks for in a judge. The American people don't believe judges should rely on their empathy to decide legal cases or seek to advance their vision of what America should be. They know Justices are not above the law. They know Justices should be neutral umpires, not taking sides in the game. Above all, they know judges—especially Supreme Court Justices—should not legislate from the bench.

I do not desire that the Supreme Court advance my political views. It is enough, day after day, that the Court follows the law deciding cases honestly. No more should ever be asked of them. I might not agree one day with this case or that one, but we have a right to expect those judges would be objective and not promote agendas. A recent commentator once said: ''We liberals have gotten to the point where we want the court to do for us that which we can no longer win at the ballot box.''

Well, this nominee, I think, in my honest evaluation, comes from that mold. Yes, she is young, but her philosophy is not. It is an old, bankrupt judicial activism—a philosophy the American people correctly reject. In her writings, her judicial heroes, her extensive political activities, her actions at Harvard to unlawfully restrict the military, her hostility to congressional actions against terrorism in a letter she wrote, her efforts to block restrictions on partial-birth abortion while in the Clinton White House, her arguments before the Supreme Court last year that Congress can ban pamphlets criticizing politicians and, perhaps the most disturbing to me as someone who spent 15 years in the Department of Justice, her actions as Solicitor General of the United States, whereby she failed to defend the don't ask, don't tell congressional law—not military policy, a law she had openly, deeply opposed but promised to vigorously defend were she to be confirmed as Solicitor General—leave no doubt what kind of judge she would be: an activist, liberal, progressive, politically minded judge who will not be happy simply to decide cases but will seek to advance her causes under the guise of judging.

In addition, her defense of these positions at her hearings, her testimony, in my opinion, lacked clarity, accuracy, and the kind of intellectual honesty you look for in someone who would sit on such a high and important Court. Indeed, her testimony was curious. She failed to convey to the committee, in my opinion, a recognition of the gravity of the issues with which she had been dealing and the nature of her role in dealing with some of these issues that she was involved with in her career. She seemed to suggest that things happened around her and she did all things right and no one should get upset about it.

Some of these concerns, I think, could have been overcome, had we seen the superb quality of testimony at her hearing as given by that of Justices Roberts and Alito at their hearings. But, alas, that we did not see, not even close. Glib, at times humorous, conversant on many issues but not impressive on any in a more serious way, in my view. Based on so little serious legal practice—only 2 years, right out of law school in a law firm and 14 months as Solicitor General—this perhaps should not be surprising. The power of the testimony of Roberts and Alito did not spring fully formed from their minds either, though both seemed to be naturally gifted in the skills needed for superior judges, and I fear Elena Kagan is not so blessed.

While she is truly intelligent, the exceptional qualities of her mind may be better suited to dealing with students and unruly faculty than with the daily hard work of deciding tough cases before the Supreme Court. But Roberts and Alito, on the other hand, were steeped in the law over many years as lawyers and judges. That is who they were. That is their skill. That was their craft. That was their business. They understood it. It showed. Ms. Kagan did not show that. I believe that

lack of experience was part of the reason her testimony was unconvincing.

I think a real lawyer or experienced judge who had seen the courtroom and the practice of law would not have tried, as she did, to float their way through the hearing in the manner she did. Her testimony failed to evidence an understanding of the gravity of the issues with which she was dealing and the important nature of her role in them. She seemed to suggest these events just happened around her, none of which was her responsibility. Several times in the course of her testimony she inaccurately described the circumstances and the nature of the matters in which she had been engaged, to a significant degree. Her testimony was more consistent with the spin the White House was putting out than the truth. I was surprised and disappointed that she was not more candid and did not, through accurate testimony, dispel some of the false spin that had been put out in her favor.

So now we are at the beginning of the discussion of the Kagan nomination. While I have been firm in my criticisms of the nominee, I have given considerable thought to the criticism that I have made and tried not to be inaccurate in them. I believe they are correct. But if I am in error, I will be pleased to admit and correct that error. No nominee should have their record unfairly sullied in this great Senate. That would be wrong. I, therefore, ask and challenge the supporters of the nominee to point out any errors in my remarks as we go forth so we can, above all, get the facts straight.

The matters I will set forth today and later are serious. There is disagreement, I believe, between what the record, the facts, and the testimony show and the White House spin and even the Kagan spin—and I use that word carefully. So let us, therefore, begin this debate in all seriousness. Let us get to the bottom of these matters. There is a truth. We can ascertain what happened. Let us find out what happened in these matters. Let us get to the bottom of it.

Some raise the question of how many Republicans will vote for the nominee. Another question to ask is: How many Democrats will vote against the nominee? I call on every Senator to study the record and make an informed and independent decision. We are not lemmings. We have a constitutional duty to make an independent decision. So I urge my Democratic colleagues to not just be a rubberstamp, to not allow political pressures to influence your decisions but conduct an independent and fair analysis of the nominee. I believe if Senators strongly advocate and believe judges should follow the law, not make it; that they should serve under the Constitution and not above it; that they should be impartial and objective—if Senators believe in that—they should have very serious trouble with this nomination.

At this moment I am going to briefly mention a few of the serious concerns that were raised in the committee. I will in greater detail go through each of them in the next several days. I am sure other Senators will talk about them also. I will attempt to do so honestly and fairly, and at the end I will be listening to see if somehow I have misjudged the nominee on these matters and whether I should change my views. But I am very serious when I say the actions of this nominee over the entirety of her career indicate an approach to judging that is inconsistent with the classic American view of a judge as one who shows restraint, who follows the law, who adjudicates the matters before the court, and who is objective and fair.

One of the more serious issues that has been discussed quite a bit is the nominee's handling of the U.S. military while she was dean at Harvard. She reversed Harvard's policy and banned the military from the campus recruiting office. During that period of time a protest against the military was held. She spoke to that protest crowd while in the building next door a military recruiter was attempting to recruit Harvard students for the U.S. military.

She participated in the writing of a brief to oppose the don't ask, don't tell policy which she deeply opposed.

The U.S. military did not have a policy called don't ask, don't tell. That was a law passed by the U.S. Congress and signed by President Clinton. It was the law of the land and it was not their choice. They followed, saluted, and did their duty. Yet Ms. Kagan barred them from the campus at Harvard. On four different occasions this Congress passed laws to try to ensure that our military men and women, during a time of two wars, were not discriminated against on college campuses in this country. One of them was a few months before, finally, it was written in a way they could not figure out a way to get around it. That was shortly before she barred them from the campus, subjecting Harvard to loss of Federal funds, which resulted in the military, when they finally realized that she had reversed this policy and found out they had been stonewalled and the front door of the university had been closed to them, appealed to the president of Harvard University and he reversed her position. It was not justified. It was wrong. It should not have been done.

She did not seem to complain about the policy when she worked for President Clinton, who signed the law. But she punished the men and women who were prepared to serve and defend our country, and Harvard's freedom to carry on whatever these silly activities they want to carry on. So this is not a little bitty matter.

When she was nominated for Solicitor General, this was raised and she was asked what if this don't ask, don't tell law is challenged in the Court? We know you oppose it. We know you have steadfastly opposed it. Will you defend it? It is the law of the land. You will be Solicitor General. You represent the U.S. Government before the Supreme Court. Will you defend it?

She flat out said that she would defend the laws passed by Congress and specifically promised to defend don't ask, don't tell. This is a matter of some importance. I asked her about it, gave her opportunity to respond. She took 10 minutes—I did not interrupt her—with her explanation of why she did not assert an appeal to the Ninth Circuit ruling that seriously undermined don't ask, don't tell, because we know President Obama opposes it and we know she opposed it. We know the ACLU opposed it. They were the litigants in this case. She met with the ACLU.

The ACLU did not want the Ninth Circuit case to go up to the Supreme Court. Why? The reason is they expected the Supreme Court would affirm the law. So what did Elena Kagan do? Did she vigorously defend the law? Did she take the opportunity to take this case to the Supreme Court and seek its affirmation by the Supreme Court? No, she allowed the case to be sent back—without appealing it—to a lower court to go through a long, prolonged process of discovery and trial that is disconnected to the plain fact of the legality of the policy. She did not properly defend the laws of the United States and she did not defend the law in this matter.

The Solicitor General has that duty whether they like the law or not. Congressional actions, when challenged, should be defended, particularly one so easily defended, in my opinion, as this one. I believe that is a serious matter, so serious that if my analysis is correct, that she failed to defend that action after explicitly having promised to do so, then this is disqualifying in itself. She would have allowed her personal views, political pressures from perhaps her appointing officer, President Obama, to influence her decision in a way that went against her duty as Solicitor General. We are going to talk about that in great detail as we go along.

As Solicitor General in the 14 months that she was there, she approved a filing of a brief calling on the Supreme Court to review and overturn a ruling by the Ninth Circuit Court of Appeals that had affirmed an Arizona law that said Arizona businesses that failed to use E-Verify or otherwise hire people who are illegally in the country would lose their business license. There is a Federal statute that explicitly says States can revoke licenses of businesses that violate our immigration laws.

This is quite a bit stronger case than the other Arizona case that I think is improvidently being challenged, also by the Obama Department of Justice. But she approved this and again the trial court had ruled the law was good. The Ninth Circuit, the most liberal activist circuit in the country, approved

it unanimously, and now it is before the Supreme Court and now she asked that the Supreme Court take it and reverse that.

I think this was bad judgment legally, and I believe it is another example of her personal policy views influencing the decisions she made as a government official—not the kind of thing you want in a Supreme Court Justice.

Then there was the time she was in the Clinton White House and became involved in the great debate we had in the Senate, that went on for a period of years, over the partial-birth abortion issue, where unborn babies are partially removed from the mother and there are techniques used to remove the child's brain. It is a horrible procedure. The physicians group, the American College of Obstetricians and Gynecologists, ACOG, had issued a finding that there was never any medical necessity for this horrible procedure that Senator Daniel Patrick Moynihan referred to as so terribly close to infanticide.

President Clinton apparently was prepared to support a ban on this procedure. But Ms. Kagan, as a member of his staff, advised that it might be unconstitutional. In her notes from her time at the Clinton White House, she said the groups, that is, the pro-abortion groups—the groups will go crazy. She even got ACOG to issue a new statement and was able to influence President Clinton to oppose the legislation. Six or 8 years went by before we finally passed a law banning the procedure.

When I raised this at her hearing, she tried to make it seem like she had nothing much to do with it, like she just happened to be in the White House. She said, ''at all times trying to ensure that President Clinton's views and objectives were carried forward.'' That is all I was doing.

She was asked about that: If that was your view, say so.

Well, I was just doing whatever the President wanted me to do.

I do not think that was an accurate analysis of it. Sometime after it became clear that ACOG had reversed its position—it caused quite a bit of national controversy. She was right at the center of that, contacting the leaders of ACOG and prompting them to change the wording of their statement without talking to the professionals on the committee that had issued the original analysis. There was never any need for this kind of procedure to take place. This was concerning to a lot of members of the committee. Her testimony is relevant to that.

With regard to the second amendment, she used the same language in her testimony to give the impression that she understood that the Heller and the McDonald cases, recently out of Chicago, were settled law and implied that if she were on the Court, she would vote to uphold the right to keep and bear arms, which is plainly in the Constitution. I went back and asked her again. Settled law became mere precedent. That precedent is the 5-to-4 decision in two cases, Heller and McDonald, where by one vote the Supreme Court is upholding the right to keep and bear arms. If one vote were to switch, the Court could rule 5 to 4 that any city and any State in America could ban completely the right to keep and bear arms, violating what I would say are the plain words of the Constitution. Her actions, both as a law clerk and in the Clinton White House, indicate she has a hostile view to gun ownership. She grew up on the upper west side of New York. It is pretty clear she is one of a group who sees the NRA as a bad group and does not believe in gun ownership as a constitutional right. This is a serious matter because it is such a narrowly decided Court.

Who is this nominee? We will learn more about it as the days go by. I believe her actions, her background, and her approach to judging is unhealthy. It is not the kind of thing we need on the Supreme Court. It evidences a tendency to promote her political agenda rather than being objective. Who is she? Vice President BIDEN's chief of staff, Ron Klain, a lawyer with whom she worked closely in the Clinton administration and a longtime friend, said of her not long ago:

> Elena is clearly a legal progressive . . . I think Elena is someone who comes from the progressive side of the spectrum. She clerked for judge Mikva

A renowned Federal activist judge—

clerked for Justice Marshall—

One of the most activist Justices on the Supreme Court—

worked in the Clinton administration, worked in the Obama administration. I don't think there's any mystery to the fact that she is, as I said, more of the progressive role than not.

What does that mean, a legal progressive? In the early 20th century, progressives thought that intellectuals and the elites in this country knew more than the great unwashed, and they were seeking to advance political agendas that went beyond what a lot of people thought was appropriate and constitutional. The progressives saw the Constitution as an impediment, not as a protector of our liberties, of our freedom, of our prosperity, of our property. They saw it as an impediment to getting done what they would like to do. It is a dangerous philosophy.

Ultimately, all our liberties depend on faithful adherence to the Constitution—the free speech, free press, the right to a trial by jury. All those things that are so important to our rights are in that document.

This nominee is indeed of that background. She is not sufficiently respectful of the plain words of the Constitution. She will be the kind of activist judge who seeks to advance her vision of what America should be. That is not an appropriate approach for a Justice on the Supreme Court to take. That is why I will be opposing the nomination.

I suggest the absence of a quorum and ask unanimous consent that time under the quorum call be charged equally to both sides.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MCCONNELL. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCONNELL. I will proceed on leader time.

RECOGNITION OF THE MINORITY LEADER

The PRESIDING OFFICER. Without objection, it is so ordered.

The minority leader is recognized.

FMAP

Madam President, the American people are getting a good reminder this week of why they have lost faith in Washington Democrats. Not only is one of the last things Democrats plan to vote on here before the August recess another bailout, it is also just the kind of bloated, slapdash affair Americans have come to expect and to loathe from Democrats in Washington. Basically what we are seeing here this week is the final act in Washington's guide for responding to a recession.

On Thursday they threw together a bill without even knowing how much it would cost the taxpayers, expecting us to vote on it yesterday. When they found out last night it cost more than they thought it would, they threw another bill together and expect us to vote on that one tomorrow—just before Senators head out of town. This is precisely the kind of rushed and reckless approach to lawmaking that has most Americans thinking congressional Democrats can't go on their August recess fast enough. If it means one less bailout cobbled together without regard for details or its impact on the taxpayers or its impact on the debt, taxpayers would probably be glad to help book Democrats' plane tickets out of here.

Americans are fed up. They have had enough. The trillion-dollar stimulus bill was supposed to be timely, targeted and temporary. Yet here we are, a year and a half later, and they are already coming back for more. The $100 billion they got for State education budgets the first time wasn't enough, even though more than a third of the original $100 billion hasn't even been spent yet, and none of the extra money they are asking for will necessarily be used to save teachers' jobs. The purpose of this bill is clear: it is to create a permanent need for future State bailouts, at a time when we can least afford it.

Same goes for health care spending. The original stimulus included about $90 billion in additional Federal Medicaid spending. That too was supposed to be temporary. Yet here we are, a year and a half later, and they want more.

So, as I said, the purpose of this bill is clear. It is a last-minute effort by

Democrats in Washington to funnel more money to the public employee unions before an election and to set the stage for the massive tax hike that the administration plans to spring on America's small business owners on January 1 of next year. Once again, Democrats are showering money on their favored constituencies and asking the American people to pay for it with higher taxes, more government, and fewer private sector jobs.

It is time our friends on the other side actually do something to address the jobs crisis in this country. As it is, virtually every bill they pass adds more burdens on the very people we need to get us out of the recession and create jobs. If a bill doesn't kill jobs or make it harder to create them, they are not interested. It is time for a different approach. The approach of the past year and a half just is not working.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. CARDIN. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CARDIN. Madam President, let me start by first expressing my appreciation to Senator LEAHY and Senator SESSIONS. I have the honor of serving on the Judiciary Committee, and I think our leadership—our chairman, Senator LEAHY, and our ranking Republican member, Senator SESSIONS—conducted the confirmation process in the best tradition of the Senate.

We had 4 days of hearings before the Judiciary Committee. Every member of the committee was afforded ample opportunity to question Solicitor General Kagan on a far range of issues, and we got complete responses. We had chances for followup questions. We even had a third round of questioning. We had outside witnesses who were before our committee. We had a chance to ask them questions as third-party validators. We also went through tens of thousands of pages of documents.

This was a very thorough confirmation process, a very open confirmation process, and a very fair confirmation process. I do thank Senator SESSIONS, the ranking Republican member, for the way he cooperated with Senator LEAHY to make sure the Senate did its business in getting a full record before voting to confirm Elena Kagan to be an Associate Justice of the Supreme Court of the United States.

Solicitor General Elena Kagan has the experience, the intelligence, the integrity, and the temperament to serve as an Associate Justice of the Supreme Court of the United States. As to her experience, she was the first woman Solicitor General in the history of our Nation. She was the first woman to be dean at the Harvard Law School. Her intelligence has been acknowledged by all as to her being a person who is very capable to be the next Associate Justice of the Supreme Court.

Previous Solicitor Generals, including Charles Fried, Ken Starr, Ted Olson, and Paul Clement—Democrats and Republicans—stated that Elena Kagan would ''bring to the Supreme Court a breadth of experience and a history of great accomplishment in the law.'' They are Democratic and Republican former Solicitors General.

She has the integrity. We have seen third-party validators—Democrats and Republicans—testify to her integrity and legal career. She certainly has the temperament. She put up with the Senators' interrogations with a calm demeanor and good humor, which I think will serve her well on the Supreme Court of the United States.

She brings to this position experience from being a clerk for Justice Thurgood Marshall. I heard his name mentioned many times during this confirmation process. We in Maryland are particularly proud of Thurgood Marshall. He comes from the State of Maryland. He comes from Baltimore. He was one of the great leaders on the Supreme Court, one of the great lawyers of our time. I think we all are very proud of what America is today thanks to Justice Thurgood Marshall. I think it only adds to the qualifications of Solicitor General Elena Kagan to have clerked for Justice Thurgood Marshall.

I heard my colleague talk about her commitment to our military. Let me point this out: This was a very difficult issue for Harvard Law School in regard to their policies. But let me quote, if I might, from a letter from Iraqi war veterans:

> During her time as dean, she has created an environment that is highly supportive of students who have served in the military. . . .Under her leadership, Harvard Law School has also gone out of its way to highlight our military service. . . .

Students have complimented the way she acted as dean to support our veterans. She comes from a military family. In fact, during the time in question, the number of Harvard Law School students who were recruited into military service went up. So I think you have to look at the record. She has been extremely supportive of our veterans, extremely supportive of those who serve our Nation in military service.

As a last point, let me quote from Miguel Estrada. I think most people know Miguel Estrada. He was nominated to the DC Circuit Court of Appeals and considered to be one of the conservative nominees. He said:

> If such a person, who has demonstrated great intellect, high accomplishments and an upright life, is not easily confirmable, I fear we will have reached a point where no capable person will readily accept a nomination for judicial service.

So I would hope we all could agree that Solicitor General Elena Kagan is well qualified to serve as an Associate Justice on the Supreme Court of the United States.

What we want from an Associate Justice is a judge who will follow legal precedent, giving due deference to Congress, following the best traditions of the Supreme Court in protecting the rights of Americans against the abuses of power. To me, that is judicial restraint, to stay within the mainstream of American values.

I believe Solicitor General Kagan represents that best tradition of following legal precedent, giving due deference to Congress, standing for ordinary Americans against the abuse of power. For those reasons, I will vote to confirm her to be the next Associate Justice of the Supreme Court of the United States.

During the confirmation hearings, I used that opportunity to explain to my constituents, indeed, to the people of this Nation, that Supreme Court decisions have real consequences on the lives of our constituents. If you are a woman, if you are a consumer, if you are a worker, if you are a voter, if you care about the air you breathe or the water you drink, you should be very concerned about Supreme Court decisions. It affects your life.

I am very concerned, and I think my constituents are concerned, about recent 5-to-4 decisions where the majority, the so-called conservative Justices, legislated from the bench on the side of powerful corporate interests over protecting ordinary citizens.

During the confirmation process, I raised these issues and questioned Solicitor General Kagan on these cases in which there were 5-to-4 decisions, which reversed precedents. In my view, they were cases where they were legislating from the bench and they were restricting the rights of ordinary Americans.

I mentioned the Ledbetter case. I know the Presiding Officer is very familiar with the Ledbetter case, in which a 5-to-4 decision from the Supreme Court effectively told the women of our Nation they would have no effective rights to bring wage discrimination cases based upon gender. The Supreme Court basically said the statute of limitations would run even if you did not have knowledge of the discriminatory act. Lilly Ledbetter was denied her claim as a result of that decision.

I think it is going to be healthy for America to have more women on the Supreme Court of the United States. When Elena Kagan is confirmed, she will, for the first time in America's history, be the third woman out of nine on the Supreme Court of the United States. I think that is going to give us more commonsense justice in this Nation and certainly one that reflects the diversity of our country.

It was not just the Ledbetter case. There have been other cases in which workers have found the Supreme Court has ruled on the side of special interest corporate America over the rights of

ordinary workers. In the Gross case, the Supreme Court reversed precedent, here again by a 5-to-4 decision, and ruled that we would use a different test for age discrimination, effectively denying claims by those who were discriminated against because of their age. This is another example where the so-called conservative Justices on the Supreme Court reversed precedent, reversed the clear intent of Congress, and ruled against workers in favor of corporate America.

It is not just limited to worker cases or wage cases. In the Citizens United case—this is a case we have talked about a great deal on the floor—the Supreme Court not only ruled against Congress, because we had legislated the McCain-Feingold bill, but ruled against prior Supreme Court decisions to reverse the rights of ordinary Americans in their election process. What the Citizens United case said is corporate America could spend more on elections—not already spending enough, but they could spend more. Even though Congress had passed bipartisan laws to rein in the amount of special interest corporate money and even though other cases were upheld by the Supreme Court, the Supreme Court went out of its way, by a 5-to-4 decision, to rule on the side of corporate America against ordinary Americans.

Here, if I might, let me quote from Justice Stevens in his dissent. Justice Stevens said:

> Essentially, five Justices were unhappy with the limited nature of case before us, so they changed the case to give themselves an opportunity to change the law . . . there were principled, narrower paths that a Court that was serious about judicial restraint could have taken.

I agree with Justice Stevens. We all talk about wanting to see judicial restraint. We all talk about wanting to see a Supreme Court that will give due respect to the actions of Congress. We talk about following judicial precedent. We talk about following the tradition to protect your constitutional rights. Well, this Supreme Court, too many times, by 5-to-4 decisions by the so-called conservative Justices, has been the most activist Court on ruling on the side of corporate America over ordinary Americans.

It is also true in environmental cases—the Rapanos case. I have the honor of chairing the Water Subcommittee on the Environment and Public Works Committee. We work very hard, Congress has worked very hard, to protect our environment. It is not easy to get legislation passed in the Congress. I know all of us are frustrated that we cannot get more legislation passed. But we have gotten some very important bills passed to protect our environment, such as the Clean Water Act, and we have protected our waterways. The courts have upheld our power to do that.

But in the Rapanos case, the Court ruled, again, by the narrowest of margins, on the side of corporate America against protecting our environment, against congressional intent, against prior decisions of the Supreme Court, ruling on the side of corporate America over protecting our environment for future generations.

That was also true very recently in the Exxon v. Baker case. This was particularly important because it took over a decade for those who were damaged by the Exxon Valdez oilspill, by the episode in Alaska, to be able to get their claims brought through the courts. The Supreme Court, again, by the narrowest margin, reduced the claims of those who were damaged as a result of the Exxon Valdez spill.

I know all of us are very concerned about what is happening in the Gulf of Mexico. We want to make sure BP is held fully accountable for all the damage it has caused. We in Congress need to do our work to make sure that is done. I expect we will get it done. But we also need the Supreme Court of the United States to uphold the power of Congress to pass laws. We are the legislative branch of government, and too often this so-called conservative majority of the Supreme Court has ruled the other way.

I believe Solicitor General Elena Kagan will follow in the best traditions of the Supreme Court. She will follow legal precedent, allowing Congress to legislate. I say that, in part, because of her testimony before our committee. I questioned Solicitor General Kagan as to our environmental statutes and the role Congress plays.

She replied:

> Congress certainly has broad authority under the Constitution to enact legislation involving the protection of our environment. When Congress enacts such legislation, the job of the Court is to construe it consistent with Congressional intent.

That is the type of Justice I want on the Supreme Court in order to protect our air and protect our water, while yielding to Congress to pass the statutes rather than legislating from the bench. Basically, I want to make sure the next Associate Justice of the Supreme Court is on the side of ordinary Americans.

Once again, let me quote from Solicitor General Kagan from her opening statement to the Judiciary Committee. When she was talking about equal justice under the law she said:

> It means that everyone who comes before the Court—regardless of wealth or power or station—receives the same process and protections . . . What it promises is nothing less than a fair shake for every American.

That, again, is what I would like to see from the Supreme Court. I want them to be on the side of ordinary Americans, giving them a fair shake, protecting them from the abuses of power, whether those abuses come from the halls of government or from corporate America. In too many cases, this Supreme Court, by narrow margins through the more conservative Justices, has not been on the side of ordinary Americans. I believe Solicitor General Kagan, as Associate Justice Kagan, will give Americans a fair shake and will continue in the best traditions of the Supreme Court in advancing Americans' rights against the abuses of power. For that reason, I intend to vote for the confirmation of Elena Kagan to be the next Associate Justice of the Supreme Court of the United States.

With that, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. UDALL of New Mexico). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. CARDIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CARDIN. Mr. President, while speaking in support of Solicitor General Elena Kagan, I quoted from a letter received from former Solicitors General in support of Solicitor General Kagan for the position of Associate Justice of the Supreme Court. It is dated June 22, 2010, signed by former Solicitors General in support of the confirmation of Elena Kagan.

I also spoke about the endorsement received from Miguel Estrada. He wrote an extraordinary letter that speaks to the qualifications of Solicitor General Elena Kagan for Associate Justice of the Supreme Court. It is addressed to the chairman of the committee, PATRICK LEAHY, and the ranking member, JEFF SESSIONS, dated May 14, 2010.

I ask unanimous consent these two letters be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JUNE 22, 2010.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. JEFF SESSIONS,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY AND SENATOR SESSIONS: We write to support the nomination of Elena Kagan to be the next Associate Justice of the Supreme Court of the United States. We have served as Solicitors General in the administrations of Presidents Ronald Reagan, George H. W. Bush, William Clinton, and George W. Bush. We support the Kagan nomination in the same spirit of fairness and bipartisanship, and deference to presidential appointments of well-qualified individuals to serve on the Supreme Court, that was also due the nominations of then-Judges John G. Roberts, Jr. and Samuel A. Alito, Jr. to serve on the Supreme Court.

Elena Kagan would bring to the Supreme Court a breadth of experience and a history of great accomplishment in the law. In addition to her most recent service as Solicitor General, at various points of her career she has served as a law clerk to Supreme Court Justice Thurgood Marshall, she has been in private practice at one of America's leading law firms, she has served in the office of the Counsel to the President, she has been a policy advisor to the President, she has served

as a law professor at two of the nation's leading law schools, Harvard and Chicago, and she has served as Dean of the Harvard Law School.

During the past year, Kagan has honored the finest traditions of the Office of the Solicitor General and has served the government well before the Supreme Court. The job of Solicitor General provides an opportunity to grapple with almost the full gamut of issues that come before the Supreme Court and requires an understanding of the Court's approach to numerous issues from the criteria for certiorari review to the Justices' approach to oral argument. The constant interaction with the Supreme Court that comes with being the most-frequent litigator before the Court also ensures an appreciation for the rhythms and traditions of the Court and its workload. Moreover, as Solicitor General, Kagan had the opportunity to work with the immensely talented career lawyers in the Office of the Solicitor General, who have a deep understanding of and appreciation for the Court. Kagan's most recent experience as Solicitor General will serve her well as she wrestles with the difficult questions that come before the Court.

The Constitution gives the President broad leeway in fulfilling the enormously important responsibility of determining who to nominate for seat on the Supreme Court of the United States. In that spirit, we support the nomination of Elena Kagan to be Associate Justice and believe that, if confirmed, she will serve on the Court with distinction, as have prior Solicitor Generals who have had that great honor.

Respectfully,

WALTER DELLINGER;
THEODORE B. OLSEN

On behalf of:

CHARLES FRIED, *Solicitor General, 1985–1989;*
KENNETH W. STARR, *Solicitor General, 1989–1993;*
DREW S. DAYS III, *Solicitor General, 1993–1996;*
WALTER DELLINGER, *Acting Solicitor General, 1996–1997;*
SETH P. WAXMAN, *Solicitor General, 1997–2001;*
THEODORE B. OLSON, *Solicitor General, 2001–2004;*
PAUL CLEMENT, *Solicitor General, 2004–2008;*
GREGORY G. GARRE, *Solicitor General, 2008–2009.*

GIBSON, DUNN & CRUTCHER LLP,
Washington, DC, May 14, 2010.

Hon. PATRICK LEAHY,
Chairman, Senate Committee on the Judiciary, U.S. Senate, Washington, DC.
Hon. JEFF SESSIONS,
Ranking Member, Senate Committee on the Judiciary, U.S. Senate, Washington, DC.
Re: Nomination of Elena Kagan.

DEAR CHAIRMAN LEAHY AND SENATOR SESSIONS: I write in support of Elena Kagan's confirmation as an Associate Justice of the Supreme Court of the United States. I have known Elena for 27 years. We met as first-year law students at Harvard, where we were assigned seats next to each other for our classes. We were later colleagues as editors of the Law Review and as law clerks to different Supreme Court Justices; and we have been friends since.

Elena possesses a formidable intellect, an exemplary temperament and a rare ability to disagree with others without being disagreeable. She is calm under fire and mature and deliberate in her judgments. Elena would also bring to the Court a wealth of experience at the highest levels of our government and of academia, including teaching at the University of Chicago, serving as the Dean of the Harvard Law School and experience at the White House and as the current Solicitor General of the United States. If such a person, who has demonstrated great intellect, high accomplishments and an upright life, is not easily confirmable, I fear we will have reached a point where no capable person will readily accept a nomination for judicial service.

I appreciate that considerations of this type are frequently extolled but rarely honored by one side or the other when the opposing party holds the White House. I was dismayed to watch the confirmation hearings for then-Judge Alito, at the time one of our most distinguished appellate judges, and find that they ranged from the anodyne and uninformative to the utterly disgraceful. And one could readily identify members of the current Senate majority, including several who serve on the Judiciary Committee, who, when they previously assessed the judicial nominees of the other party, earnestly articulated many of the same objections that doubtless will be raised against Elena (such as a lack of judicial experience, a perceived absence of a ''paper trail,'' or whether the nominee's views truly are in the legal mainstream). I respectfully submit that it brings no credit to our government, and risks affirmative harm to our courts, when our elected representatives simply swap talking points—emphasizing the same considerations they previously minimized or derided—only to revert to their former arguments as soon as electoral fortunes turn.

Lest my endorsement of Elena's nomination erode the support she should receive from her own party, I should make clear that I believe her views on the subjects that are relevant to her pending nomination—including the scope of the judicial role, interpretive approaches to the procedural and substantive law, and the balance of powers among the various institutions of government—are as firmly center-left as my own are center-right. If Elena is confirmed, I would expect her rulings to fall well within the mainstream of current legal thought, although on the side of what is popularly conceived of as ''progressive.'' This should come as a surprise to exactly no one: One of the prerogatives of the President under our Constitution is to nominate high federal officers, including judges, who share his (or her) governing philosophies. As has often been said, though rarely by senators whose party did not control the White House at the time, elections have consequences.

Elena Kagan is an impeccably qualified nominee. Like Louis Brandeis, Felix Frankfurter, Robert Jackson, Byron White, Lewis Powell and William Rehnquist—none of whom arrived at the Court with prior judicial service—she could become one of our great Justices. I strongly urge you to confirm her nomination without delay.

Very truly yours,

MIGUEL A. ESTRADA.

Mr. CARDIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. FEINSTEIN. Mr. President, I rise to speak in support of the nomination of Elena Kagan to be an Associate Justice on the Supreme Court.

Having served on the Senate Judiciary Committee now for 17 years, I have seen the impact that new Justices have on the Court, and I strongly believe these votes are among the most important we cast in this Chamber.

There is no question that the confirmation process has become heated in recent years. Outside interest groups and the 24-hour news cycle have placed far too much emphasis on sound bites, half truths, and hyperbole. But none of this should obscure the fact that these are, in fact, important votes because the stakes are high.

A Supreme Court Justice, once confirmed, will serve a life appointment on a Court that is truly foundational to our democratic system.

For over 200 years, our independent judiciary has served as a model to the world. We have watched as other countries have struggled with courts that have become beholden to political pressures or fallen subject to corruption.

I think of Pakistan, where in 2007 President Musharraf proclaimed a state of emergency and used it to suspend the country's constitution and remove justices from the supreme court; or Mexico, where corruption is so bad that in 2008 President Calderon called for a fundamental redesign of the entire judicial system.

In the United States we have guarded our judiciary, and it has served us well. Our Supreme Court has acted as a true check on government abuses, as a reliable and impartial tribunal for the resolution of private disputes, and as a final arbiter where the American people can come to seek protection of their fundamental constitutional rights.

As Justice Breyer said in a recent public address, the virtue is that ''a country of 300 million very diverse people will resolve their differences under law and not with guns on the street or through riots.''

In the context of world history, this is most impressive.

When it comes to the Supreme Court, nominations merit careful attention as well because any one Justice can have a substantial effect on the Court's rulings.

The cases that reach the Supreme Court are not easy ones. When the law is clear, a case is settled by the parties or resolved by the district courts or the courts of appeal. It is when the law is open to multiple interpretations or when constitutional values must be weighed against each other that a case is likely to reach the Supreme Court.

In these cases, decisions are not automatic. Instead, each of the nine Justices must examine the facts, study

the law, and reach his or her best conclusion about what the law requires. The Court's rulings stand not just as abstract statements for the law books but binding decisions with lasting impact on the lives of the American people.

There are examples in the newspaper every day. In 2005, the Justices held that a school district in Seattle had violated the equal protection clause by using race as one of a series of factors in assigning students to schools within that district. The real impact of this will be to make it far more difficult for school administrators to maintain racial diversity in our public schools.

Another example: In a recent antitrust case—Leegin Creative Leather Products v. PSKS—the Justices put forth a new interpretation of the law that will allow manufacturers to set minimum prices for certain products. What this means for Americans is, when they go to the store, they may find that a particular electronic device or even a shampoo has the same price at every store and can never be put on sale. Legislation to overturn this decision is still pending before the Senate.

In each of these cases, Justices were divided on the law. Five Justices agreed on the Court's ruling, but the remaining four Justices dissented and explained in vehement terms why they disagreed with their colleagues' reasoning and result. The decisions, in other words, were not formulaic.

So when I undertake my constitutional role of providing advice and consent, I do so with the understanding that every nominee to the Court is not the same, and each and every one could have a lasting impact on the future of our country.

With this in mind, I am very pleased to support the nomination of Elena Kagan to be the next Associate Justice of the United States Supreme Court.

Look at her professional record. Summa cum laude and Phi Beta Kappa from Princeton; a master's degree in philosophy from Oxford University; magna cum laude from Harvard Law School; a supervising editor of the Harvard Law Review; legal clerkships with U.S. Circuit Court Judge Abner Mikva and Supreme Court Justice Thurgood Marshall; two years at the law firm of Williams and Connolly; a professor of constitutional and administrative law at the University of Chicago; a special counsel to the Senate Judiciary Committee for the nomination of Justice Ruth Bader Ginsburg; an associate White House counsel to President Clinton; the deputy director of President Clinton's Domestic Policy Council; a professor at Harvard Law School; the first woman dean of Harvard Law School; the first woman to ever serve as the Solicitor General of the United States.

That is an amazing background. You would think she is 106 instead of a very young woman.

It is easy to see why her name has so often appeared on short lists for the Supreme Court. She is a woman of repeated firsts. If confirmed, she will be the fourth—not the first—woman to sit on the Supreme Court.

Frankly, I have been surprised to hear some of my colleagues question Elena Kagan's credentials for the Court.

Let me start with the argument made by some that her record is somehow inadequate because she lacks prior judicial experience.

It is true that all nine Justices on the current Supreme Court come directly from the U.S. Court of Appeals. But that is a historic anomaly. It has never happened before. In fact, in the history of the Court, approximately one-third of our Justices have come to the bench with no prior experience as a judge.

When the President announced this nominee, Justice Scalia, for one, said he was happy to see that she is not a Federal judge and not a judge at all. Justice Felix Frankfurter went much further, stating in a speech in 1957:

> One is entitled to say, without qualification, that the correlation between prior judicial experience and fitness for the functions of a Supreme Court is zero. The significance of the greatest among the justices who have had such experience, Holmes and Cardozo, derived not from that judicial experience, but from the fact they were Holmes and Cardozo.

In my own view, judicial experience is a useful background, but it is only one of many, and it is a background that is well represented on the Court today. As a matter of fact, it is entirely represented on the Court today.

The point is this: When we examine Elena Kagan's records, we should not allow the characteristics of the current Court to make us shortsighted. In the course of American history, the Senate has confirmed Justices with a broad variety of backgrounds—Justices who were law professors, such as Felix Frankfurter; attorneys in private practice, such as Warren Burger; elected officials, such as John McKinley, Earl Warren, and James Byrnes; and over 10 percent of our Justices have—like Elena Kagan—come directly from the executive branch, with no judicial experience in between. These include Chief Justice William Rehnquist, who was Assistant Attorney General; Justice Byron White, who was Deputy Attorney General; Justice Robert Jackson and Chief Justice Harlan Fiske Stone, who were both the Attorney General of the United States; and Chief Justice John Marshall, who was the Secretary of State.

Again, these are Justices who distinguished themselves on the Court, who came directly from the political experience. In my mind, the President has made a wise choice with this nomination because, in addition to this woman's impressive brain power—and I sat there and listened to her hour after hour keep her calm, show humor, and display an impressive ability to cite cases, and even footnotes of those cases—she brings the valuable attribute of having first-hand working knowledge of all three branches of government. If confirmed, she, Justice Breyer, and Justice Thomas, will be the only Justices to share that distinction.

Take her experience with the Supreme Court itself. As a ''27-year-old pipsqueak,'' as she said before the committee, Elena Kagan had the privilege of working as a law clerk on the Supreme Court to Justice Thurgood Marshall. The job itself is prestigious, and it is impressive that Kagan was selected. The real value, however, was in giving Kagan an inside view of the Court through the eyes of one of our great Justices, the lawyer who argued Brown v. Board of Education, the first African-American Justice on the Supreme Court, and a man who brought to life the Court's most basic promise of ''equal justice under law.'' She had that experience.

As Elena Kagan said at her confirmation hearing, through Justice Marshall, she learned that our courts are ''special as compared with other branches of government. In other words, that it is the courts' role to make sure that even when people have no place else to go, they can come to the courts and the courts will hear their claim fairly. That is a valuable lesson indeed for both a young lawyer and a new Supreme Court Associate Justice.''

Today, Kagan has an equally unique perspective on the Court. As the Solicitor General, she sometimes is referred to as the ''tenth justice,'' because there is no other lawyer who interacts as frequently with the Justices. In her time as Solicitor General, she has filed hundreds of briefs and argued six cases before the Supreme Court itself. If confirmed, she will be one of only five sitting Justices who have appeared on the advocate's side of the Supreme Court bench.

Solicitor General Kagan also brings practical experience with the legislative branch. She worked in the halls of the Senate as a special counsel to the Senate Judiciary Committee for the Ginsburg nomination, and during the Clinton administration, she bore responsibility for advancing President Clinton's domestic policy agenda as the Deputy Director of the Domestic Policy Council. She served, for example, as the administration's chief negotiator for tobacco reform legislation. So she knows the ins and outs of the legislative process.

This position enabled her to experience firsthand the hard work, negotiation, collaboration, and navigation of procedural obstacles that are required to move a difficult bill through Congress.

When the Justices are called upon to interpret a statute, or determine its constitutionality, it is essential that they have some appreciation for the process by which that law came to be and the intent of Congress in writing and shaping that law. Elena Kagan knows the legislative process, and I believe that will serve our Nation well.

Finally, Elena Kagan also brings experience as a participant in the executive branch. As the Solicitor General, she has represented the U.S. Government before the Supreme Court; as an associate White House counsel, she had to advise President Clinton on the scope of Presidential powers and privileges; and as a Deputy Director of the Domestic Policy Council, she supervised the President's policy initiatives not only by advancing legislation in Congress but also in cooperation with Federal agencies.

Already, the debate has begun among legal commentators about whether Kagan's work on the executive branch will skew her rulings in key cases—we heard this earlier this morning—dealing with the scope of the President's powers with respect to indefinite detention, warrantless surveillance, or the use of force outside of a declaration of war.

The lessons of history again provide perspective here. I think of Justice Robert Jackson, a former Attorney General of the United States, who wrote an opinion that now stands as the cornerstone for all analysis—and I mean that—of limits on executive power. We have heard this quoted by virtually every nominee before the Judiciary Committee when a question of executive power is levied.

In the famous Youngstown case, in 1952, the Court was called upon to decide whether the President's authority as Commander in Chief allowed him to seize the Nation's steel mills in order to ensure sufficient wartime production to meet the Defense Department's needs for the Korean war.

In his prior role as the Attorney General of the United States, Robert Jackson had vigorously defended the President's prerogative to take steps necessary to advance the Nation's war effort. But as Justice Jackson, he took a different tack. He agreed with the majority that the President did not have the authority to seize the private steel mills, but in doing so, he set forth a compromise framework, stating that the President's power was greatest when he acted pursuant to an act of Congress, in a zone of ''twilight'' when the Congress has not spoken, and at its lowest ebb, when he acted contrary to the stated will of the Congress.

When a colleague pointed out that Justice Jackson's compromise framework differed from the position he had taken as Attorney General, he replied that a Justice does not ''bind present judicial judgment by earlier partisan advocacy.'' That is a very profound statement from a great Justice, who wrote an opinion that has stood the test of time.

I tell this story to make this point: Elena Kagan's clerkship for Justice Marshall, her work with the Congress in the 1990s, and the positions she takes now as Solicitor General cannot forecast, with any certainty, what results she will reach in cases before the Court. I think Justice Jackson is living proof of that. However, they do provide important assurance that she will appreciate the core principles and perspectives that undergird the work of each and every branch of this government. Like Justice Jackson, this has the potential to make her a very persuasive and impressive Justice.

In sum, I believe Elena Kagan's professional background makes her superbly qualified to sit on the Supreme Court.

An excellent professional background is, of course, a necessary qualification, but a nominee must also show that he or she has the appropriate judicial temperament, has a commitment to follow the law, and brings a judicial philosophy that will not pull the Court outside of the mainstream. And I have confidence in her in each of these areas.

The Senate Judiciary Committee has received over 170,000 pages of documents spanning Kagan's entire career. She testified before us for 18 hours over a space of 3 days. She has answered over 200 additional questions for the record, and scores of letters have been sent to us regarding her qualifications. What repeatedly emerges from all of this is that Elena Kagan is a pragmatist, a problem-solver, and a conciliator.

Her time as dean of Harvard Law School—misinterpreted often—paints a vivid picture. Elena Kagan arrived at Harvard in 1999. She was selected to be dean only 4 years later. She was the first woman ever named so—a significant accomplishment in itself.

What is most important, however, is that during her time at Harvard, she developed a reputation as a steady leader who would bring all sides to the table and work to solve a problem. As described in a letter from 69 former deans supporting her nomination, she had a unique ''willingness to listen to diverse viewpoints and give them all serious consideration. She revealed a strong and consistent aptitude for forging coalitions that achieved smart and sensible solutions, often in the face of seemingly insoluble conflict.'' Quite a statement from 69 deans of law schools.

She brought conservative faculty, such as Bush administration lawyer Jack Goldsmith, to the school and rallied the faculty to come together to support them. Former Solicitor General Charles Fried described her effect this way: ''The place is like it's never been before.'' She ''managed to calm the factionalism, so it's completely disappeared.'' That is according to former Solicitor General Charles Fried. The Boston Globe stated it more simply, saying that she ''thawed Harvard law.''

This same knack for the pragmatic and drive toward consensus echoes throughout her career.

A liberal scholar from the University of Chicago has characterized her academic work this way:

She is much more of a lawyer than a partisan. She is more interested as a scholar in thinking through hard issues than advocating particular ideological or political perspectives.

Former Clinton Chief of Staff John Podesta has written that during the Clinton administration, Kagan ''distinguished herself as deeply loyal to the Constitution and the law'' and said that ''on issues ranging from adoption to religious freedom to tobacco regulation, [she] eschewed ideology in favor of practical solutions.''

Her friends, her admirers, her colleagues repeatedly describe her in those terms: a problem-solver, a conciliator, someone who brings people together even when they have very different views.

What really impresses me, though, is what we have heard from conservatives. Let me note that the very fact we have heard from these conservatives is impressive. In today's political atmosphere, lawyers take a risk when they cross party lines to support Supreme Court nominees. Key people have done so for Kagan.

Former Bush appointee to the Tenth Circuit and current Stanford law professor Michael McConnell sent us an 8-page letter outlining the reasons for his strong support for Kagan's nomination. Elena Kagan, he said, shows ''respect for opposing argument, fairmindedness, and willingness to reach across ideologic divides, independence, and courage to buck the norm.'' ''No one,'' he said, ''can foresee the future, but I would not be surprised to find that Elena Kagan, as a Justice, serves more as a bridge between the factions of the Court than as a reliably progressive vote.''

Senator GRAHAM, my colleague on the committee, has pointed to the words of Miguel Estrada, a deeply conservative lawyer who has known Kagan for 27 years. He describes her as having ''a formidable intellect, an exemplary temperament, and a rare ability to disagree with others without being disagreeable. She is calm under fire and mature and deliberate in her judgments.''

Today, we have a divided Court—a Court in which the Justices are repeatedly split five to four on major rulings of the day. These rulings determine what kinds of gun laws legislatures can pass to protect the public safety in our cities, how much money will be spent in Federal elections, what school districts can and cannot do to maintain racial diversity in our schools, what remedy our older and women workers have when their employers discriminate against them, what the appropriate role for religion is in our public life, or how much a company can be required to pay for causing significant harm to our environment. And these Justices are split down the middle on these major questions. They cannot find compromise or agreement. Major questions of the day are adjudicated on a bare majority.

We badly need a Justice who can drive this Court toward consensus, and

I have high hopes Elena Kagan will be just such a Justice.

Her record also gives me confidence that she will follow the law and put aside any personal policy preference when deciding cases on the Court. In the course of her career, whether working on policy or on law, law has always come first. And as Solicitor General, she has proven quite clearly that she can put her personal views aside, filing, for example, a brief that defended the constitutionality of don't ask, don't tell. Although she is known to strongly disagree with that policy, she defended it and stated that the Court should let stand a First Circuit decision that upheld the policy because it properly deferred to the reasoned military judgment of the executive and legislative branches.

Finally, I believe she has set forth an appropriate judicial philosophy. In 3 days of hearings before our committee, she has revealed herself as a person who believes that judges should follow precedent, stare decisis, and exercise restraint in their rulings. She said:

> [N]o judge should look at a case and say, ''Oh, I would have decided it differently; I'm going to decide it differently.'' [A] judge should view prior decisions with a great deal of humility and deference.

She told us:

> The time I spent in the other branches of government remind me that [the role of the Court] must also be a modest one—properly deferential to the decisions of the American people and their elected representatives.

Hers will be a welcome voice on the Court.

I wish to take one last moment, if I may, to address questions about her actions related to military recruiting at Harvard Law School because I believe, to some extent, they have been inaccurately depicted. While each Member will have to draw his or her own conclusions about whether Dean Kagan took the wisest course, I believe it is essential that we get the facts straight.

As dean, Elena Kagan never barred military recruiters from the Harvard Law School campus. For one semester, after the U.S. Court of Appeals for the Third Circuit held that the Solomon amendment was unconstitutional, Kagan reverted to an earlier school policy that had been used for many years before she became dean. That is fact. Under that policy, the military recruited through the Harvard Law School Veterans Association but was excluded from the Office of Career Services. At all times, the military had access to students. In fact, military recruitment levels at Harvard remained steady and even increased at times during Kagan's tenure as dean.

But what is most striking to me in reviewing all of this is that although the judiciary has heard from servicemembers on both sides of this issue, every report we have received from a veteran or servicemember who actually attended Harvard at the time has been in strong support of Kagan's nomination to the Court.

Marine Corps CPT Bob Merrill graduated from Harvard Law School in 2008. He is currently serving in Afghanistan. He writes:

> Kagan's positions never affected the services' ability to recruit at Harvard. Behind the scenes the dean assured that our tiny Harvard Law School Veterans Association never lacked for funds or access to facilities.
>
> She treated the veterans at Harvard like VIPs, and she was a fervent advocate of our veterans association.

First Lieutenant David Tressler graduated from Harvard Law School in 2007 and is currently serving in Afghanistan with the U.S. Army Reserves. He wrote that ''while Dean of Harvard Law School, [Kagan] adequately proved her support for those who had served, were currently serving, and all those who felt called to serve.''

Navy Judge Advocate General Corps LT Zachary Prager graduated in 2006 and wrote that ''Dean Kagan set a standard at Harvard of respect for military servicemembers'' and that without Kagan's ''leadership and evenhandedness as Dean,'' he would not have joined the military.

Like Admiral Mike Mullen, Secretary of Defense Robert Gates, Secretary of the Navy Ray Maybus, retired General Colin Powell, myself, and many others in this Chamber, Kagan has said she personally disagrees with the don't ask, don't tell policy. And she is not alone.

At certain dark moments in our history, institutions of higher education have shown a hostility in this sense, but those contexts should not be confused.

To oppose the exclusionary policy of don't ask, don't tell is not to oppose or show hostility toward the military; it is instead to say that the time has come for all willing and able Americans to be able to serve. Like Elena Kagan, I strongly believe the criteria for military service in our country should be competence, courage, and a willingness to serve, not race, gender, or sexual orientation.

Members should draw their own conclusions about whether Kagan made the right choice as dean in returning to Harvard's old recruiting policy in 2005, but I want to be clear that nothing in her record shows any hostility toward the military or the men and women who serve our country. In fact, servicemen and women who were there at the time have come forward, and the evidence is to the contrary.

In sum, and in conclusion, I believe Elena Kagan will be a fine Justice on the U.S. Supreme Court, and I look forward to the day soon when she takes her seat as the fourth woman in history to serve on that Court. I am very proud to support her nomination.

I thank the Chair, and I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Mr. President, Elena Kagan is intelligent, well spoken, personable, and schooled in the law. She is skilled in the art of argument, perhaps to a fault. Ignoring her own advice in the now famous University of Chicago Law Review article, she did not testify meaningfully before the Judiciary Committee, concealing and disguising her views and playing the same game of ''hide the ball'' as some who went before her, albeit with more skill. Probably because she criticized the practice so directly, many expected her to set a different standard.

Others have asked whether Judiciary Committee hearings have been rendered largely free of substance and what, if anything, can be done about it. The former Judiciary Committee chairman, ARLEN SPECTER, who lamented that Ms. Kagan, during her testimony, had not ''answered much of anything,'' went on to say this:

> It would be my hope that we could find some place between voting no and having some sort of substantive answers. But I think we are searching for a way how Senators can succeed in getting substantive answers, as you advocated in the Chicago Law Review, short of voting no.

I confess that, similar to Senator SPECTER, I don't know how we can force nominees to be forthcoming except through our votes.

To be clear, my threshold for supporting a nominee does not require answering how one would vote on issues sure to come before the Court, nor necessarily expressing agreement or disagreement with decisions or Court opinions. It is possible to learn much about a nominee's approach to judging without committing one to a specific position in future cases. What we should expect, however, is candor and a willingness to honestly discuss background and general constitutional principles, approaches to judging and writings and matters within the nominee's background that bear on the nominee's suitability for the bench.

In explaining why I could not vote for now-Justice Sotomayor, I said I thought she was disingenuous with the Judiciary Committee. Obviously, reaching such a conclusion precludes support, notwithstanding other qualifications for the position. Reluctantly, after analysis of her testimony, weighed with her past writings, statements, and actions, I have reached the same conclusion regarding Elena Kagan.

Exhibit A is her insistence on redefining her position on military recruiting on Harvard campus. Her ''separate but equal'' defense and attempt to downplay the steps she took to undermine the legal policy of don't ask, don't tell were, ultimately, unbelievable. It is almost unfathomable, for example, that someone with Ms. Kagan's considerable legal acumen could have, as she asserted, always thought we were acting in compliance with the Solomon amendment.

Ms. Kagan tried to convince the Judiciary Committee that her actions against the military were a justifiable response to a policy she viewed as discriminating against homosexuals. But

as Senator SESSIONS noted, her stand against homosexual discrimination was not universal. She did not speak out, for example, when Harvard accepted $20 million from a member of the Saudi royal family to establish a center for the study of Sharia law, even though under Sharia law ''sexual activity between two persons of the same gender is punishable by death or flogging.'' Her decision to punish the military for a policy adopted by Congress is especially perplexing, given her failure to express concern over or take action against the establishment of a center to promote a legal system linked to the abuse of homosexuals, women, and others.

Exhibit B is her astonishing legal definition of what she meant in her effusive praise for Justice Marshall's vision of the role of the Court, presumably to avoid the obvious conclusion that she agreed with his activist approach to judging. Justice Marshall had an enormous influence on our jurisprudence, starting with his advocacy before—and most especially with—Brown v. Board of Education. But no serious student would argue that he didn't try to push the law as far as he could in furtherance of his philosophy.

Indeed, consider the comments of another former Marshall clerk, liberal law professor Cass Sunstein, who now serves in the Obama administration, who has said this:

A serious commitment to Marshall's vision of constitutional liberty would entail an extraordinary judicial role, one for which courts are quite ill suited.

He has also acknowledged:

Even if the best substantive theory calls for something like Marshall's vision, institutional considerations would argue powerfully against it.

Ms. Kagan's attempt to define Justice Marshall's philosophy as meaning only that he wanted everyone to have equal access to the courts is—there is no other word for it—disingenuous.

Because Ms. Kagan apparently embraces his philosophy but feared public acknowledgment of that would confirm the concern that she would be a results-oriented judge, she fudged. In doing so, she confirmed the suspicion and compounded the problem with deceptive testimony.

Exhibit C is the explanation of several of her bench memos to Justice Marshall, insisting they did not contain her views but were merely a channeling of his. Ms. Kagan offered this explanation of her memo categorizing litigants as ''good guys'' and ''bad guys,'' another memo stating that the government was ''for once on the side of the angels,'' and a memo expressing fear that the Court might ''create some very bad law on abortion and/or prisoners' rights.'' Reading these memos, one gets the sense that Ms. Kagan was not simply channeling her boss but was instead expressing her own personal policy views on matters before the Court and that they had as much to do with who the litigants were as what the issues were.

Ms. Kagan also attempted to recast her praise of Israeli Supreme Court Justice Aharon Barak, who, in the words of the Associated Press, is widely acknowledged as someone who took an activist approach to judging. Well, that is exhibit D. Judge Richard Posner described Judge Barak's history on the Israeli Supreme Court as ''creating a degree of judicial power undreamed of even by our most aggressive Supreme Court justices.''

Under his leadership, the Israeli Supreme Court aggrandized its own power far beyond what even many of those on the left would view as acceptable in America. To cite one example of Justice Barak's judicial philosophy, he wrote a judge's role ''is not restricted to adjudicating disputes in which parties claim that their personal rights have been violated'' but rather ''to bridge the gap between law and society.''

Well, bridging gaps, clearly, and using the law to address societal problems is not the job of the courts. That is a political approach.

Ms. Kagan claimed, during her hearing, that her praise for Justice Barak had nothing to do with his leftwing judicial philosophy. But an examination of her statements tells a different story. In 2002, Ms. Kagan praised Aharon Barak for ''presiding over the development of one of the most principled legal systems in the world.''

In 2006, she again heaped professional praise on Justice Barak, calling him her ''judicial hero.'' Ed Whelan, who is a noted legal commentator, summarized this event well:

Kagan begins by referring to the portraits of four ''great justices'' with whom Harvard Law School has been associated—Brandeis, Holmes, Brennan, and Frankfurter. But, she says, ''the Harvard Law School association of which I'm most proud''—more proud, that is, than of the associations with Brandeis, Holmes, Brennan, or Frankfurter—''is the one we have with President Barak of the Israeli Supreme Court.

And then she continued:

I told President Barak, and I want to repeat in public, that he is my judicial hero. He is the judge or justice in my lifetime whom [sic], I think, best represents and has best advanced the values of democracy and human rights, of the rule of law and of justice.

During her confirmation hearing, Ms. Kagan, under oath, testified that she admired Justice Barak for his role in:

. . . creating an independent judiciary for Israel. . . . not for his particular judicial philosophy, not for any of his particular decisions.

That testimony cannot be squared with her public declaration that Justice Barak ''is the judge or justice in my lifetime whom [sic], I think, best represents and has best advanced the values of democracy and human rights, of the rule of law and of justice.''

Exhibit E is Ms. Kagan's answer to whether she is a legal progressive. Her statements, again, were designed to cloud her views. Vice President BIDEN's Chief of Staff, Ron Klain—who served as chief counsel of the Senate Judiciary Committee, Chief of Staff to Attorney General Reno, and Chief of Staff to Vice President Gore—has known Ms. Kagan as far back as 1993, when they worked together on the Ginsburg hearings. At Ms. Kagan's hearing, Senator SESSIONS pointed out that after Ms. Kagan was nominated, Mr. Klain said:

Elena [Kagan] is clearly a legal progressive. I think Elena is someone who comes from the progressive side of the spectrum. She clerked for Judge Mikva, clerked for Justice Marshall, worked in the Clinton administration, worked in the Obama administration. I don't think there's any mystery of the fact that she is, as I said, of more of the progressive role than not.

Senator SESSIONS then asked Ms. Kagan:

Do you agree with the characterization that you're a legal progressive?

She replied:

I honestly don't know what that label means.

So Senator SESSIONS pressed Ms. Kagan:

I'm asking about his firm statement that you are a legal progressive, which means something. I think he knew what he was talking about. He's a skilled lawyer who's been in the midst of the great debates of this country about law and politics, just as you have. And so I ask you again: Do you think that is a fair characterization of your views? Certainly, you don't think he was attempting to embarrass you or hurt you in that process.

She again dodged with an answer that strains credulity.

I love my good friend, Ron Klain, but I guess I think that people should be allowed to label themselves. And that's—you know, I don't know what that label means and so I guess I'm not going to characterize it one way or the other.

So a nominee to the highest Court in the land and a former dean of one of the Nation's most prestigious law schools insists that she doesn't know what the term ''legal progressive'' means.

But later in the hearing, Senator GRAHAM mentioned that Greg Craig, President Obama's first White House Counsel, had praised Ms. Kagan. Mr. Craig said:

[Elena Kagan] is largely a progressive in the mold of Obama himself.

So Senator GRAHAM asked:

Would you consider them, your political views, progressive?

Then Ms. Kagan acknowledged that, yes, her ''political views are generally progressive.''

It is hard to believe Ms. Kagan knows what a political progressive is but not a legal progressive.

Exhibit F: Her attempt to redefine her views in the letter sent to Judiciary Committee on November 14, 2005, in which she objected to the Graham-Kyl-Cornyn amendment dealing with treatment of enemy detainees. Her characterization of our approach as being similar to the ''fundamentally lawless'' actions of ''dictatorships'' was clearly, I believe, injudicious and revealed the fervor of her position, much like her

characterization of the don't ask, don't tell policy as ''a moral injustice of the first order,'' and it could suggest a viewpoint that she would have a hard time laying aside if similar questions ever came before her as a Supreme Court Justice.

Her attempt to distance herself from the obvious application of her views to places other than Gitmo—obvious because her letter bemoaned the ''serious and disturbing reports of the abuse of prisoners in Guantanamo, Iraq and Afghanistan''—and issues other than conviction and sentencing—even though her letter stated that our amendment ''unfortunately'' would ''prohibit challenges to detention practices, treatment of prisoners, adjudications of their guilt and their punishment''—suggests either that she was uncomfortable defending her position or she wanted to preserve her right to sit on such cases in the future or both. The attempt to obscure positions she had previously stated was, I believe, an attempt to run away from those positions and mislead the committee.

Exhibit G: Ms. Kagan's doublespeak on the question of same-sex marriage. Prior to her confirmation as Solicitor General, when she was not restricted, as judicial nominees are, in her ability to comment on issues that may come before the courts, Senator CORNYN asked Ms. Kagan a direct question about her personal views:

Do you believe that there is a fundamental constitutional right to same-sex marriage?

Her answer then seemed clear. She wrote:

There is no Federal constitutional right to same-sex marriage.

But at the hearing, when I asked Ms. Kagan to confirm her views on this subject, she distorted both Senator CORNYN's question and her answer. She told me Senator CORNYN had asked whether she could ''perform the role of the Solicitor General'' and vigorously defend DOMA, given her opposition to don't ask, don't tell. When I pointed out that Senator CORNYN's question was about a constitutional right to same-sex marriage, not DOMA, Ms. Kagan then asserted that her answer to Senator CORNYN—that ''there is no Federal constitutional right to same-sex marriage''—intended to convey that she ''understood the state of the law and accepted the state of the law.'' Having reinterpreted her previous answer, she then told me that, as a Supreme Court nominee, it would not be ''appropriate'' for her to share her personal views on the subject, since such a case may come before the Court.

It strikes me that Ms. Kagan was, at the time of her nomination to be Solicitor General, trying to create an impression—apparently a false one—that she did not personally believe the Constitution could be read to include a right to same-sex marriage.

That leads to Exhibit H: her involvement, while serving as Solicitor General, in a case concerning the constitutionality of the Defense of Marriage Act, DOMA.

When nominated for the job of Solicitor General, Ms. Kagan emphasized in her opening statement the ''critical responsibilities'' that the Solicitor General owes to Congress, ''most notably the vigorous defense of the statutes of this country against constitutional attack.'' Later, Ms. Kagan reiterated that she could represent the interests of the United States ''with vigor, even when they conflict with my own opinions. I believe deeply that specific roles carry with them specific responsibilities and that the ethical performance of a role demands carrying out these responsibilities as well and completely as possible.''

Ms. Kagan even cited former Solicitor General Ted Olson's defense of the campaign finance laws as an example of the way a Solicitor General should approach the job. She said, ''I know that Ted Olson would not have voted for the McCain-Feingold bill, but he . . . did an extraordinary job of defending that piece of legislation. . . . And that's what a solicitor general does.''

Yet, there is substantial reason to doubt that Ms. Kagan genuinely carried out her obligation to ''vigorously defend'' a Federal statute in district court, the Defense of Marriage Act. In response to questions at her Supreme Court hearing, Ms. Kagan acknowledged that she was involved in two district court cases involving DOMA. Her personal involvement in these cases was itself unusual as she admitted in response to written questions: ''In the normal course, the [Solicitor General's] Office does not participate in district court litigation.''

Her involvement would not have necessarily raised concerns were it not for the position that the government advocated in the cases. In the first case, Smelt v. United States, the Department of Justice filed a brief that, as part of its so-called ''defense'' of the DOMA statute, admitted to the court that ''this Administration does not support DOMA as/matter of policy, believes that it is discriminatory, and supports its repeal.'' How can a lawyer mount a ''vigorous'' defense of a statute while declaring the statute to be discriminatory? But it gets worse. The Justice Department's brief also asked the court to ignore one of the strongest arguments in support of DOMA—namely that traditional marriage serves as a valuable vehicle for encouraging responsible procreation and childbearing. The brief asserted that the government ''does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing.''

It is clear that the Justice Department's brief, which was supposed to be filed in support of the DOMA statute, in fact undercut the law's constitutionality. As one legal scholar and proponent of same-sex marriage said about the Justice Department's argument:

This new position is a gift to the gay-marriage movement, since it was not necessary to support the government's position. It will be cited by litigants in state and federal litigation, and will no doubt make its way into judicial opinions. Indeed, some state court decisions have relied very heavily on procreation and child-rearing rationales to reject SSM [same-sex marriage] claims. The DOJ is helping knock out a leg from under the opposition to gay marriage.

The Smelt case was later dismissed by the district court for other reasons. And that brings us to the second DOMA case in which Ms. Kagan was involved—Gill v. Office of Personnel Management. In Gill, the Justice Department again offered the same half-hearted defense of DOMA and repudiated its strongest legal arguments. This time, however, the district court seized on the Justice Department's rejection of the procreation and childbearing rationales and found that DOMA was unconstitutional. Ed Whelan, the noted legal commentator and a former principal deputy of the Office of Legal Counsel, has explained that the decision in Gill ''would be ridiculous but for DOJ's abandonment of Congress's stated justifications for DOMA. Under proper application of the very deferential 'rational basis' review, for example, it would be enough to recognize that it would have been reasonable for Congress in 1996 to regard traditional marriage as a valuable vehicle for encouraging responsible procreation and childbearing.''

Although Ms. Kagan admitted being involved in both Smelt and Gill, she refused to tell us her role in the deliberations. In response to written questions, Ms. Kagan did admit that her participation in Smelt was ''sufficiently substantial'' that she would recuse herself should the case come before the Supreme Court. But this promise itself was disingenuous because the Smelt case had already been dismissed, so there was no chance that it would come before the Supreme Court. On the other hand, the Gill case may very well make its way to the Supreme Court, but Ms. Kagan did not promise to recuse herself from participating in it, despite her involvement in formulating the Justice Department's flawed defense of DOMA in the case.

We will likely never know what Ms. Kagan's advice was in these cases. What we do know is that Ms. Kagan has a history of ignoring the law when it conflicts with the gay rights agenda. We also know that she took the unusual step of getting involved in these district court cases challenging DOMA. And we know that the Justice Department went out of its way to abandon one of the fundamental rationales for the DOMA statute, which resulted in a court, for the first time ever, ruling that DOMA was unconstitutional. On the basis of these facts, I believe that any reasonable observer would question whether Ms. Kagan kept her promise to us that she would ''vigorously defend'' Federal statute as Solicitor General.

Exhibit I is her dubious explanation of why, in another case that she handled as Solicitor General, she declined

to appeal the Ninth Circuit's adverse ruling in Witt v. Department of the Air Force, a case challenging the constitutionality of the government's don't ask, don't tell statute. At her hearing, Ms. Kagan claimed that allowing the Ninth Circuit decision to stand, and accepting a remand and trial in district court, would provide the Supreme Court with a ''fuller record'' and would help the government ''show what the Ninth Circuit was demanding that the government do'' to defend don't ask, don't tell.

But a review of the Ninth Circuit opinion and the record in the case shows that Ms. Kagan's explanation was disingenuous. The Ninth Circuit itself had already said what the government would need to prove for the Federal law to survive—there was no need to develop a ''fuller record'' or seek further clarification from the courts.

Ms. Kagan's decision to let the case return to the district court ensured that members of the military would be subjected to invasive and humiliating trials in the Witt case and in all other challenges against don't ask, don't tell—trials in which soldiers would be compelled to testify against their comrades, discuss their views of a fellow soldier's sexual practices, and watch as the unit's personnel files become fodder for lawyers trying to condemn what is supposed to be a military-wide policy. The government rightly argued before the trial court that such trials are guaranteed to destroy unit cohesion—the very thing that Congress sought to protect when it passed the don't ask, don't tell statute. And the trial court records show that Kagan knew in advance that the trial process would harm the military's interests. But she decided to thrust the government into exactly the position the military's lawyers most wanted to avoid, perhaps to keep in place, and insulate from Supreme Court review, a Ninth Circuit ruling that places don't ask, don't tell policy in jeopardy.

In addition to my concerns that Ms. Kagan was less than candid with the Judiciary Committee, I am also concerned about her leftist ideology and the potential it will influence her judging. I will discuss three areas of concern.

First, is her defense of the brief filed in Chamber of Commerce v. Candelaria. It takes a clever lawyer to argue that the Court should take this immigration case, but not Lopez-Rodriguez v. Holder on the traditional reasons for granting certiorari. In Candelaria, she asked the Supreme Court to strike down an Arizona law that permits the State to suspend or revoke the business licenses of companies that knowingly employ illegal aliens. She did this even though Federal law expressly authorizes States to enforce immigration laws ''through licensing'' and even though the courts that have considered the issue have determined that States could do precisely what Arizona did. Yet, in Lopez-Rodriguez, another immigration case, she refused to appeal a decision by the Ninth Circuit that permits ordinary deportation hearings to be bogged down by long legal fights over the admissibility of clear evidence that a person is illegally here. Unlike Candelaria, the Ninth Circuit's decision in Lopez-Rodriguez was in conflict with the decisions of other courts—including the Supreme Court—involved a significant constitutional issue. It is difficult not to conclude that Ms. Kagan's actions in these two cases were driven less by the law, and more by political expediency.

My second concern about ideology is that Ms. Kagan has shown she may hold a limited reading of the second amendment, even after the Heller and McDonald cases. When asked whether the right to bear arms was a ''fundamental right,'' Ms. Kagan said, ''I think that that's what the court held in McDonald.'' She also said that the holding was ''[g]ood precedent going forward.'' Of course, there is a record of nominees describing the holding of a case and proclaiming that it is ''good precedent,'' only to vote to overturn or distinguish that precedent once they ascend to the bench. Justice Sotomayor did just that on this issue.

But we need not rely on cynicism to demonstrate that Ms. Kagan may not view the recent second amendment precedents as settling the question of whether gun ownership is a ''fundamental right.''

Generally speaking, when a constitutional right is ''fundamental,'' any government restriction of that right is subject to ''strict scrutiny'' by the courts. But at her hearing, Ms. Kagan left open the possibility that some other, lesser standard of scrutiny should apply to second amendment restrictions. She said that ''going forward the Supreme Court will need to decide what level of constitutional scrutiny to apply to gun regulations.'' This does not sound like a commitment to the principle that the second amendment guarantees a fundamental right. When weighed with her well-documented work in the Clinton administration to advance gun control legislation, I believe there is a justifiable concern that Ms. Kagan would vote to construe Heller and McDonald as narrowly as possible.

Third, I am concerned that Ms. Kagan sees few, if any, limitations on Congress's authority to regulate behavior, or interstate commerce. In a remarkable exchange, Senator Coburn asked Ms. Kagan whether it would be constitutional for Congress to pass a law requiring Americans ''to eat three vegetables and three fruits every day.'' Although Ms. Kagan said that such a law sounded ''dumb,'' she refused to say that such a law would be unconstitutional. In fact, during the course of the exchange, Ms. Kagan repeatedly emphasized that a court analyzing such a statute should ''read the [commerce] clause broadly'' and give ''real deference'' to Congress.

I agree that the commerce clause gives the Congress substantial authority, but it does not give Congress unlimited authority. That Ms. Kagan was unwilling to say a law requiring the consumption of produce is beyond Congress's authority suggests she would vote to uphold statutes that exceed the boundaries of the commerce clause. Stretching the commerce clause gives too much power to Congress.

Finally, it is worth noting that Ms. Kagan came to the Senate with a lack of legal and judicial experience, especially when compared to other recent nominees. Some have reached back 40 years to compare Ms. Kagan's experience to that of Chief Justice Rehnquist, the last nominee without prior judicial experience confirmed to the Supreme Court in 1972. William Rehnquist, however, spent 16 years as a practicing litigator in my home State of Arizona and 2 more years as Assistant Attorney General, Office of Legal Counsel, a position that was later held Justice Scalia 1974–1977 and that, according to the Department of Justice, ''typically deal[s] with legal issues of particular complexity'' and ''provides authoritative legal advice to the President and all the executive branch agencies.'' In contrast, Ms. Kagan's law practice is confined to two years in private practice shortly after law school and 1 year as the Solicitor General.

Her limited experience is not by itself disqualifying, but it did increase the importance of her hearing. Had she answered questions in an honest and straightforward manner, we might have a better basis to know what kind of judge she would be. But instead, Ms. Kagan either dodged questions or gave what were clearly disingenuous answers intended to mask her views. She also failed to make the case that her political ideology would not influence her judging. For all of the reasons I have discussed, I cannot support her nomination.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized.

Mr. INHOFE. Mr. President, I certainly could not improve upon the statements and arguments that have been made by my good friend from Arizona. I come from a little different perspective. There are six things I think any one of which would seriously make us consider voting against her.

I want to say this, first, though. Back when she was first nominated I was the first one to say I was opposed to her. The main reason was these things came up, most of them, when she was up to be confirmed for Solicitor General. At that time I objected to her being in that position.

I have a policy—I think it is good; people in Oklahoma know it—and that is, if you oppose someone's confirmation for a position and then they come back later for a higher position, it is automatic because the bar should be higher.

Anyway, today I want to reemphasize a couple of things that were mentioned

by my friend from Arizona. One objection to the Kagan nomination is that she undeniably lacks the experience.

I think Senator KYL said it very well. People say there have been others in history that didn't have any judicial experience, but in those cases, they averaged 21 years of practicing law. They had that experience. This would be the first time in history we have someone with less than 2 years' experience and no judicial experience. That would be reason enough, but that is not my major objection.

My major objection is her disdain for the U.S. military. While dean at Harvard, Kagan banned the military during a time of war from recruiting on campus due to her objection over the don't ask, don't tell policy. That was the policy put together during the Clinton administration while she was in the administration. She did not object to it at that time, but she objects to it now.

There has been much made by her supporters about her role in this incident, but the truth is that in November of 2004, after the Third Circuit Court of Appeals struck down the Solomon amendment—I was there when the Solomon amendment was passed in the House—Kagan affirmatively disallowed the military from recruiting at the school's office of career services. Subsequently, she joined 40 other schools in filing an amicus brief with the Supreme Court in the case opposing the Solomon amendment which was then overwhelmingly opposed and reversed by the Supreme Court unanimously. She was taking advantage of that opportunity when she didn't allow recruiters at the university. We have seen this happen around the country, not only Harvard but in California. This is something that is definitely in opposition to the law that is still in place, referred to as the Solomon amendment.

Equally alarming to these actions is her misrepresentation of the facts before the Judiciary Committee. I wasn't aware of this, certainly not back when she was up for Solicitor General. She testified that military recruiters had ''full and good access'' to Harvard's campus. Military recruiters clearly did not have full and good access, as they had to work through the school's veterans group as opposed to being allowed to go through the office of career services, a part of the university.

Internal Pentagon documents reveal that under her deanship ''The Army was stonewalled at Harvard.'' Furthermore, Kagan told the committee that in banning recruiters she ''always thought we were acting in compliance'' with Federal law. Yet in her own e-mail to Harvard students and faculty, she wrote that she had ''hope'' that the government ''would choose not to enforce'' the law.

I am alarmed that Kagan would not only ban military recruiters on campus in a time of war but that she would do it to advance her own liberal and social agenda, then mislead the committee with her statements.

During her tenure as dean of Harvard, Kagan sent a letter with three other law school deans to the Senate in 2005 opposing legislation that sought to prevent terrorists convicted in military tribunals from appealing their convictions in Federal courts. She compared this legislation to the ''fundamentally flawless'' actions of a ''dictatorship'' that has ''passed laws stripping courts of power to review executive detention or punishment of prisoners.'' That is not what I said. That is what Ms. Kagan said.

We have the best judicial system in the world. Equating our laws relating to the war on terror to that of a dictatorship would be laughable, were it not so pervasive in liberal academia.

Kagan has a history of misrepresenting facts to push her liberal agenda, including her efforts while working in the Clinton administration to change statements of two medical associations to withhold the truth about partial-birth abortion. This is interesting. Both groups had a firm position, and she influenced a change in that position. During the debate over the Partial Birth Abortion Ban Act, Kagan wrote a memo to President Clinton in December 1996 objecting to the release of the American College of Obstetricians and Gynecologists—ACOG—proposed statement that partial-birth abortion is never medically necessary. This is what their position was. They came out and said that it was never necessary.

''The release of the statement would, of course, be a disaster.'' Those are her words, talking at that time to the Clinton administration. We have evidence from Kagan's handwritten notes that she advocated a change in the statement to reflect that partial-birth abortion may be medically necessary. One month later, ACOG released a statement with language nearly identical to Kagan's language that such abortions may be medically necessary to save the life and preserve the health of the mother. In addition to seeking to change ACOG's position, Kagan also sought to alter the American Medical Association position on partial-birth abortion. She once again tried to alter the facts and encourage AMA to change its medical policy on partial-birth abortion.

What is perhaps more concerning about Kagan's efforts to manipulate the medical policy of ACOG and AMA is that these medical policy statements were then used, sometimes successfully, in Federal courts to invalidate State laws and the Partial Birth Abortion Ban Act. She manipulated medical facts to advance a barbaric practice and push a political agenda.

We are talking about two highly respected medical associations that said partial-birth abortion was not something that was necessary, changing their positions. Then that was later used in court cases. Moreover, Kagan criticized the Supreme Court decision of Rust v. Sullivan which upheld the Department of Health and Human Services regulations prohibiting title X family planning funds from being directed toward programs where abortion is a method of family planning.

Additionally, while clerking for Justice Marshall, she authored a memo arguing that all religious organizations should be off limits from receiving Federal funds for programs authorized by the Adolescent Family Life Act such as pregnancy testing, prenatal/postnatal care, adoption counseling, and childcare, because these programs are so close to the central concerns of religion.

I also seriously question Kagan's willingness to honor and defend the second amendment, getting into an area that is probably more sensitive to a lot of my friends, including my son and members of the family, who are active and strong believers in second amendment rights. While clerking for Justice Marshall, Kagan wrote a memo about a case challenging Washington, DC's strict gun control laws. In only four sentences she was dismissive of the case, writing that she was ''not sympathetic'' to an individual-rights view of the second amendment. As everyone knows, the Supreme Court has since upheld the individual right to keep and bear arms. Kagan also used her position with the Clinton administration to advocate various anti-second amendment initiatives. Documents from the Clinton library illustrate that she supported background checks for secondary market gun purchases as well as municipal liability suits against gun manufacturers.

She helped develop an executive order banning the importation of certain types of semiautomatic weapons that were not covered by the 1994 assaults weapons ban. She also sought to permit law enforcement to retain Brady background checks information on lawful gun sales.

Finally, in an internal document regarding the Volunteer Protection Act, she described the NRA as ''a bad guy organization.''

She might get by with that in this Chamber, but she wouldn't get by with it in Oklahoma. We read the Constitution. We know what it says. She has no respect for the second amendment.

I am also gravely concerned, based on Kagan's writings and statements, that she would be a judicial activist who would seek to legislate from the bench. In her 1998 masters thesis at Oxford she wrote:

> As participants in American life, judges will have opinions, prejudices, and values. Perhaps more important, judges will have goals. And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve social ends. Such activity is not necessarily wrong or invalid.

She is stating, not just from today but going all the way back to her Oxford days, that judicial activism is appropriate. Rather than affirm the role

of judges as the faithful interpreters of the law, Kagan voiced her support for judges who seek to serve as legislators, who develop their own empathy standards and apply the law in a matter they personally see fit. Her self-acknowledged judicial hero, Aharon Barak, perfectly fits this mold. In her testimony before the committee, she even affirmed that she would consider foreign law when she decides cases. She said:

I guess I'm in favor of good ideas from wherever they come.

We are talking about referring to other countries that have a different judicial system and saying maybe they are right and maybe we are wrong. I simply cannot support a nominee who looks to other judicial systems or judicial philosophies or evolving standards of decency rather than the text of the Constitution to interpret law.

I have thoroughly reviewed the record of Elena Kagan and have come to the firm conclusion that she lacks the qualification and experience to be a Supreme Court Justice.

I have named six things. Any one of these six should be disqualifying. One is, she wants to consider foreign judiciaries. Two, she has no judicial or trial experience. Third, she is a judicial activist. Four, she is extreme in her philosophy on abortion and anti-second amendment views, and she is anti-military.

I think of all the things I have mentioned, probably the part that concerns me most is her position that if we are trying someone in a military trial, maybe a terrorist or an activist, that they would be given the right to appeal to our court system and inherit all the benefits any citizen of the United States has.

I can only say what I said several months ago when she was first nominated. In my opinion, as 1 of 100 Senators, if she is not qualified to be Solicitor General, she is certainly not qualified for the higher job of Justice of the U.S. Supreme Court.

HYDRAULIC FRACTURING

I also wish to discuss one of the problems that is going to come up tomorrow, and that is with the Democratic and Republican energy bills. I am very concerned about a process that has been successful in extracting oil and primarily gas out of tight formations, known as hydraulic fracturing. Hydraulic fracturing started in Oklahoma in 1949. We have used hydraulic fracturing to get at these tight formations for 60 years, and there has never been one case of any kind of contamination of water.

There are people who want to do away with our ability to run this machine called America. They don't want oil, gas, coal, or nuclear. That kind of gives an idea of what might be behind this.

Some say: No, we are not against hydraulic fracturing. This bill merely says we want the Federal Government to know what chemicals are used.

This is already being done on a State-by-State basis. Things aren't the same in Oklahoma as they are in New York. In Oklahoma, we have very strict rules. They know exactly what chemicals are used. By the way, 99 percent of what is used on these formations is water and sand.

I am looking forward to talking in more detail with my good friend Senator CASEY. He is kind of the author of this portion of the bill. Yet his State of Pennsylvania has huge opportunities for natural gas. I think we need to talk about that. We have enough natural gas that if we would take away all the inhibitions we have and keep hydraulic fracturing as a process to be used, we could run the country for 100 years. I think it is our job to make sure we protect that.

RECESS

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 2:15 p.m.

Thereupon, at 12:29 p.m., the Senate recessed until 2:15 p.m., and reassembled when called to order by the Presiding Officer (Mr. BEGICH).

NOMINATION OF ELENA KAGAN TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES—Continued

The PRESIDING OFFICER. Under the previous order, the time until 8:15 p.m. will be divided in alternating 1-hour blocks, with the majority controlling the first block.

The Senator from Wisconsin.

Mr. KOHL. Mr. President, I join my colleagues today in congratulating Chairman LEAHY and Senator SESSIONS for conducting fair and impartial hearings for Solicitor General Kagan. I am here today to support General Kagan's nomination to the Supreme Court. Her confirmation will be a milestone that we can all be proud of. For the first time in history, three women will be serving on the Supreme Court at one time.

General Kagan came before the Judiciary Committee with an impressive resume that had all the trappings of an accomplished lawyer worthy of appointment to the Supreme Court. During her hearings, she proved herself to be very well qualified for the job.

She impressed us with her sharp and keen mind, her intellect, and comprehensive knowledge of the Constitution and the law. She pledged to consider each case with an open mind and to impartially uphold the rule of law. She appeared mindful of the need for judicial modesty and fidelity to precedent, but not when it stands in the way of ending injustice or guaranteeing our fundamental rights.

At times during the hearings, Solicitor General Kagan seemed to be somewhat more candid than previous nominees. She disavowed a purely originalist interpretation of the Constitution, recognizing that such a limited approach will not always solve our 21st-century problems. I was pleased she unequivocally expressed her support for opening the Supreme Court to cameras. So I believe with General Kagan's confirmation, the American people will be one step closer to seeing for themselves the Supreme Court debate our most pressing legal and constitutional issues.

But despite the strength of her qualifications, like so many nominees before her, General Kagan often retreated to the generalities and platitudes she once criticized. I am pleased she rejected the analogy that Supreme Court Justices are like umpires, simply calling balls and strikes. Instead, she acknowledges that each Justice's legal judgment determines the outcome of close cases. But at times her answers gave us too little insight into what informs her unique legal judgment and how it will impact those close cases.

As I have said before, the confirmation process demands more than that. This was the public's only opportunity to hear from General Kagan. In my opinion, she made small inroads, but we still have a long way to go in meeting the high standard to which we should hold Supreme Court nominees during their confirmation hearings.

In sum, I am voting for General Kagan because she is unquestionably well qualified, has a record of being a principled, consensus-building lawyer, and because I believe her judicial philosophy is within the mainstream of our country's legal thought. I am confident she will make a superb Supreme Court Justice and is a worthy nominee to carry on Justice Stevens' long legacy of exemplary public service to our Nation.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. FRANKEN. Mr. President, above the entrance of the U.S. Supreme Court are four words, and four words only: ''Equal Justice Under Law.''

I rise today to support the nomination of Solicitor General Elena Kagan to be an Associate Justice of the U.S. Supreme Court. But I also rise today to put General Kagan's nomination in the context of the history of the Supreme Court and how that Court has affected the lives, the jobs, and the safety of working Americans.

I want to ask if working Americans are actually getting equal justice under law in the highest Court of our land. And I do not want to talk about the Court's impact on working Americans in terms of stare decisis or deference to the political branches or judicial modesty. I want to talk about this in terms of the real things that are happening to real people—real working people—right here in the United States.

In 2003, a 54-year-old man named Jack Gross was working for an insurance company in Iowa. A few years earlier, his company had chosen him to rewrite all of their policies in 1 year. And